

(23,111)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1035.

CLARENCE S. HOUGHTON, AS RECEIVER IN BANK-
RUPTCY OF THE ASSETS AND EFFECTS OF ABRAM
L. CANFIELD, BANKRUPT, APPELLANT,

vs.

WILLIAM H. BURDEN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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Petition.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

ABRAM L. CANFIELD, an alleged
Bankrupt.

2

TO THE HONORABLE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK.

The petition of WILLIAM H. BURDEN respectfully
shows to the Court as follows:

That on the 18th day of January, 1911, a pe-
tition for involuntary bankruptcy was filed in this
Court against Abram L. Canfield, and by an order
of this Court made on the same day, Clarence S.
Houghton was appointed receiver for such al-
leged bankrupt, and said Houghton thereafter duly
qualified as such receiver and entered upon his
duties as such.

3

That prior to the filing of said petition in bank-
ruptcy, and on the 5th and 13th days of January,
1911, respectively, the said Canfield duly assigned
and transferred to your petitioner, the accounts

- 4 receivable set forth in the schedules hereunto annexed, marked Schedules A and B; and at the time of said assignments, your petitioners paid to said Canfield in cash the sums of \$5,000 and \$5,628.60, respectively; and said assignments were received and said sums paid by your petitioner in good faith, and without any knowledge or notice that the said Canfield was insolvent or in failing circumstances.

- 5 That, as your petitioner is informed and believes, the said receiver has collected on the accounts above mentioned from the persons owing the same, various sums amounting in the aggregate to more than One thousand dollars, all of which money is the property of your petitioner.

That annexed hereto and marked Exhibit C is a copy of the agreement under which said assignments were made.

WHEREFORE, your petitioner prays for an order directing said receiver to pay over to your petitioner the moneys heretofore received by him on said accounts, and also directing that if any further sums shall be received by him from said debtors, he shall pay the same over to your petitioner forthwith.

- 6 Dated, New York, January 26th, 1911.

WILLIAM H. BURDEN,
Petitioner.

BRUSH & CRAWFORD,
Attorneys for Petitioner,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

SOUTHERN DISTRICT OF NEW YORK, }
State of New York, } ss.:
 County of New York, }

7

WILLIAM H. BURDEN, being duly sworn, says that he is the petitioner above named; that the foregoing petition is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILLIAM H. BURDEN.

Sworn to before me this {
 26th day of January, 1911. }

8

HENRY J. UDERITZ,
 Notary Public,

(SEAL) Kings Co.,
 Certificate filed in N. Y. Co.

9

Schedule "A".

		<u>Due.</u>	<u>Amount.</u>
	Burger's Furn. Stores, Glens Falls, N. Y.	4/1	\$316.21
	L. Bauman & Co., 8th Ave.	4/1	139.50
	Balfour Williamson Co., City....	4/1	25.40
	Geo. Behn Co., Baltimore, Md....	4/1	64.60
	C. Ludwig Bauman Co., Broadway Bklyn.	4/1	69.00
	Frank Cordts Furn. Co., Hoboken, N. J.	4/1	24.00
11	Cowperthwait & Sons, 121st St., City.	4/1	55.60
	Cowperthwait & Co., Park Row, City.	4/1	128.35
	Day & Holt Co., Catskill, N. Y....	4/1	13.50
	Force & Wyckoff, Keyport, N. J..	4/1	23.73
	John F. Fairsnyder, Nyack, N. Y.	4/1	27.95
	J. Glickman, Corona, L. I.	4/1	21.00
	J. W. Greene, Jersey City, N. J..	4/1	160.50
	Gimbel Brothers, City.	4/1	62.60
	E. A. Kirch & Co., Newark, N. J..	4/1	556.40
	L. Lauterstein, 91 9th Ave., City...	4/1	22.50
12	H. S. Landsman & Son, Danbury, Conn.	4/1	236.82
	A. D. Matthews & Son, Brooklyn..	4/1	364.04
	Michaels Brothers, 5th Ave., 9th St.	4/1	60.25
	Miron & Lifson, Elizabethport, N. J.	4/1	52.50
	H. Messersmith, Buffalo, N. Y....	4/1	358.35
	S. Margolies, 1596 Fulton St., Bklyn.	4/1	56.30
	Main Furn. Co., Paterson, N. J..	4/1	146.55
	Marcus Miller, Jamaica, L. I.	4/1	86.11
	Miller & Hyams, Brooklyn, N. Y...	4/1	50.50

Henry Pommers, Albany, N. Y....	4/1	107.75	13
A. H. Pickens, Newburgh, N. Y....	4/1	61.25	
Russell & Palmer, Batavia, N. Y..	4/1	130.00	
Chas. F. Schick, Poughkeepsie,			
N. Y.	4/1	260.46	
R. J. Stransky, Buffalo, N. Y....	4/1	139.40	
Siegel Cooper Co., City.....	4/1	57.56	
Strong & Trowbridge Co., 17 State			
St.	4/1	180.00	
J. Samuels & Brother, Providence,			
R. I.	4/1	141.19	
Slawson Woodruff & Cowan, White			
Plains.	4/1	210.15	14
M. F. Tallmage, Buffalo, N. Y....	4/1	156.75	
Tieje & Christ, Hoboken, N. J....	4/1	31.00	
F. E. Talbot, Philmont, N. Y....	4/1	28.05	
A. M. Towneley & Co., Long			
Branch, N. J.....	4/1	30.40	
H. Thomas & Sons, Glens Falls,			
N. Y.....	4/1	41.00	
H. G. Vail & Co., Oyster Bay, L. I.	4/1	74.40	
White Van Glahn & Co., City....	4/1	1286.75	
S. W. Williamson, Williamsbridge,			
N. Y.	4/1	86.50	
J. M. Wolf Co., Brooklyn, N. Y... 4/1		167.74	
Andrew Will, Hastings-on-Hudson,			15
N. Y.	4/1	15.25	
B. Zumsky, Jersey City, N. J....	4/1	43.50	
Jos. E. Zent, Buffalo, N. Y.....	4/1	404.95	

\$6,776.31

Schedule "B".

		Due.	Amount.
	S. Allen, Haverstraw, N. Y.....	4/1	\$51.65
	J. Armbrust & Son, Buffalo, N. Y. 4/1		33.75
	H. M. Ash, Paterson, N. J.....	4/1	184.45
	Bamer & McDowell, Albany, N. Y. 4/1		27.00
	C. E. Barbour & Co., Philadelphia, Pa.	4/1	113.25
	Bauman & Froelich Co., Newark, N. J.	4/1	46.26
	Benz & Son, Oswego, N. Y.....	4/1	89.00
17	J. W. Bergman, Chester, N. J....	4/1	34.50
	J. W. Bliss, 892 Manhattan Ave., Bklyn.	4/1	28.85
	J. Francis Brown, Thompsonville, Conn.	4/1	31.15
	Burger's Furn. Stores, Glens Falls, N. Y.	4/1	316.21
	F. B. Callister, Rochester, N. Y... 4/1		63.10
	H. V. Carman, Hempstead, L. I... 4/1		154.60
	Central Gas Appliance Co., Phila- delphia, Pa.	4/1	101.50
	Consolidated Gas Co., 4 Irving Place, City.	4/1	158.10
18	Cowperthwait Van Horn & Co., Newark, N. J.	4/1	310.75
	Danbury Hdw. Co., Danbury Ct... 4/1		236.67
	Dorsen & Co., Providence, R. I.... 4/1		277.50
	Eagle Specialty Co., Jersey City, N. J.	4/1	64.75
	Ph. Feldman & Son, Brooklyn.... 4/1		172.25
	Fish & Freinhar, Newburgh, N. Y. 4/1		84.80
	I. Fleishman, Syracuse, N. Y..... 4/1		127.88
	B. J. Fryatt, East Rochester, N. Y. 4/1		74.00
	Gately Furn. Co., Hornell, N. Y... 4/1		61.00
	Gimbel Brothers, City	4/1	62.60

Graff Furnace Co., City.....	4/1	265.10	19
Grand Italian Furn. Co., Navy St. Bklyn.	4/1	34.60	
Wm. Hickox, Lawrence, L. I....	4/1	52.09	
J. Holdstein, New Brunswick, N. J.	4/1	126.07	
Isthmian Canal Commission, Washington, D. C.....	4/1	998.95	
Jamaica Furn. Co., Jamaica, L. I.	4/1	106.67	
Johnstown Hdw. Co., Newburgh, N. Y.	4/1	48.12	
Kelly & McLinden, Perth Amboy, N. J.	4/1	81.75	
E. A. Kirch & Co., Newark, N. J...	4/1	84.16	20
J. Kurtz & Son, Brooklyn, N. Y...	4/1	33.55	
L. Laufer, Buffalo, N. Y.....	4/1	69.00	
Laufer & Zolte, Buffalo, N. Y....	4/1	42.00	
Le Van Brothers, Medina, N. Y...	4/1	46.00	
Fred'k Loeser & Co., Brooklyn...	4/1	58.80	
McKinney & Co., Binghamton, N. Y.	4/1	55.70	
W. F. Metzger, Herkimer, N. Y...	4/1	112.24	
Plainfield Furn. Co., Plainfield N. J.	4/1	35.25	
F. Potter, Patchogue, L. I.....	4/1	158.80	
H. Riskin, Passaic, N. J.....	4/1	50.25	
G. W. Robinson, Sayville, L. I....	4/1	29.75	21
Rockwell & Hammonds, Horse- heads, N. Y.....	4/1	40.00	
H. W. Roder & Co., Newark, N. J.	4/1	121.80	
J. R. Rose & Co., Hornell, N. Y....	4/1	106.35	
Rose & Co., City.....	4/1	545.67	
Schnecker & Abrams, City.....	4/1	52.50	
A. Schlessinger, Newark, N. J....	4/1	146.00	
Smith Hdw. Co., Oswego, N. Y....	4/1	57.00	
M. Steierman, Jersey City, N. J...	4/1	103.00	
M. Strauss, Bay Shore, L. I.....	4/1	90.04	
Sweet & Packard, Troy, N. Y....	4/1	62.07	

22	Tietje & Christ, Hoboken, N. J. . . .	4/1	56.25
	W. H. Van Buren, Watertown, N.		
	Y.	4/1	68.00
	White Van Glahn & Co., City. . . .	4/1	370.90
	Wm. F. Wild, Lindenhurst, L. I. . .	4/1	115.80
	J. M. Wolf, Brooklyn, N. Y.	4/1	56.75
	Woods, Waters & Co., 23rd St.,		
	City.	4/1	49.90
	Haug & Fletcher, Elizabeth, N. J.	4/1	43.80
	F. M. Groendyke, Mendham, N. J.	4/1	34.58
			<hr/>
			\$7,514.83

23

Schedule "C".

THIS AGREEMENT, made this 14th day of December, 1910, between ABRAM L. CANFIELD, of the Borough of Manhattan, City of New York, party of the first part, and WILLIAM H. BURDEN, of the same place, party of the second part,

WITNESSETH:

24 That in consideration of the premises and the mutual covenants and agreements hereinafter mentioned, and of the sum of One Dollar paid by the party of the second part to the party of the first part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties hereto have agreed as follows, viz:

I.—The party of the first part shall assign and transfer to the party of the second part approved accounts due from reputable debtors, and the party of the second part shall pay therefor a sum equal to seventy-five per cent of the total amount thereof, not to exceed however Ten thousand dol-

lars, unless he shall elect to advance a larger sum. 25

II.—The said accounts shall be for goods sold and delivered in good faith to the respective persons against whom the accounts exist, and in all cases, the said goods shall have been accepted by such persons.

III.—All accounts assigned under this agreement shall result from the sale of goods shipped either from the place of business of the party of the first part in the City of New York, or from one of the following factories: 26

Walker & Pratt Mfg. Co., Boston, Mass.
 American Stove Co., Cleveland, Ohio.
 Excelsior Stove & Mfg. Co., Quincy, Ill.
 Cleveland Co-Operative Stove Co., Cleveland, Ohio.
 Victor Stove Co., Salem, Ohio.
 Liberty Stove Co., Philadelphia, Pa.
 Belding-Hall Co., Belding, Mich.
 Metal Stamping Co., Jackson, Mich.
 Novelty Mfg. Co., Jackson, Mich.
 W. M. Crane Co., New York City.

IV.—Where the goods sold shall be shipped from the place of business of the party of the first part, the original shipping receipts covering the shipment referred to in the account shall be submitted to the party of the second part for his inspection at the time of the assignment of the account, and where the goods shall be shipped from one of the factories aforesaid, the invoice sent by the said factory to the party of the first part shall be submitted in like manner. 27

- 28 V.—The party of the first part shall act as the agent of the party of the second part in collecting the said accounts, but as remittances shall be received therefor, the checks and drafts shall be immediately delivered to the party of the second part, so indorsed as to make them payable to him.

- 29 VI.—The party of the first part hereby guarantees that each account so to be assigned will be paid within ten days after the same shall become due, and if any such accounts shall not be so paid, the party of the first part shall pay to the party of the second part the full amount thereof, after ten days notice in writing, and thereupon the party of the second part shall re-assign the same to the party of the first part; and if the party of the first part shall fail to so pay the amount of any such unpaid account, the party of the second part, at his election, may revoke the agency of the party of the first part to collect any of said accounts then uncollected.

- 30 VII.—The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected.

VIII.—Until all said accounts shall have been collected or re-assigned, the party of the second part shall have the right to examine at all reasonable times, the books of accounts and vouchers of

the party of the first part, which examination may be made either personally or by his duly authorized agent. 31

IX.—When the amount collected on said accounts and turned over to the party of the second part shall amount to the total sum advanced thereon, with interest at the rate of six per cent. per annum, and the party of the second part shall have received out of said collections his compensation for services as above mentioned, and all disbursements made or liabilities incurred, for exchange, or for attorneys' fees, or other expenses in and about the collection of said accounts, he shall re-assign to the party of the first part all accounts then uncollected. 32

X.—Until the termination of this contract by mutual consent, all further purchases of accounts by the party of the second part from the party of the first part shall be subject to the terms hereof.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of

G. HESS.

ABRAM L. CANFIELD. (L.S.)

ARTHUR J. KOEHLER.

for WILLIAM H. BURDEN.

WM. H. BURDEN (L. S.)

The list of factories contained in paragraph numbered III hereof is hereby amended by the addition of the following 5 names:

Toledo Stove & Range Co., Toledo, Ohio.

March Brounbach Co., Pottstown, Pa.

- 34 Roberts & Mander Stove Co., Philadelphia, Pa.
 E. H. Huenefeld Co., Cincinnati, O.
 Century Mfg. Co., Johnstown, Pa.
 New York, December 16, 1910.

ABRAM L. CANFIELD.

WM. H. BURDEN.

- (Endorsed:)—No. 14582—United States District Court, Southern District of New York.—In the Matter of Abram L. Canfield, Alleged Bankrupt.—Petition and Notice of Motion.—Brush & Crawford, Attorneys for Petitioner, 30 Broad Street, Borough of Manhattan, New York City.
- 35 —Service of a copy of within Petition and Notice of Motion is Admitted this 26th day of January, 1911.—C. S. Houghton, Receiver.—Engel Brothers, Attorneys for Receiver.—Jany. 30th, 1911.—Referred to Referee as Special Master for Examination, Testimony and Report. G. C. H. J.—U. S. District Court, S. D. of N. Y.—Filed Jan. 30, 1911.

Affidavit in Opposition to Motion.

37

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

ABRAM L. CANFIELD, alleged
Bankrupt.

38

Southern District of New York, ss.:

CLARENCE S. HOUGHTON, being duly sworn, deposes and says that he is the receiver appointed herein and that he has duly qualified as such.

That at the time of taking possession of the place of business of the bankrupt at No. 97 Beekman Street, one William H. Burden was on the premises and claimed to hold assignments of a number of account.

That the said Burden informed deponent that he had advanced to the alleged bankrupt the sum of \$10,628 for which the said bankrupt had assigned the accounts of said Burden as collateral security.

39

Deponent further says that he has made a cursory examination through his attorneys of the facts set forth in the petition of William H. Burden, which petition is dated and verified the 26th day of January 1911. That deponent has been unable to discover entries in the cash book or bank pass book of the bankrupt showing the receipt of \$10,628 from the said William H. Burden; on the contrary your deponent calls the attention of this Court to the facts that the bank pass books of the bankrupt show a deposit of about \$8,500 in the

- 40 month of January and taking into consideration the large amount of business done by the bankrupt and the large amount collected on the outstanding accounts, deponent alleges that there is reason to doubt that the said William H. Burden actually advanced the sum mentioned in his petition on the 5th and 13th day of January, 1911.

Deponent has arranged to conduct an examination of the alleged bankrupt under Section 21A which is scheduled for Wednesday the 1st of February and deponent would also like to examine the petitioner, William H. Burden, and see his checks which he claimed he gave to the alleged bankrupt for the assignment of these accounts.

- 41 Deponent therefore suggests that the motion of this petitioner be denied at this time or else adjourned until the election of a Trustee.

In the meantime deponent is willing to keep a separate account of the moneys coming in on the accounts alleged to have been assigned to the said William H. Burden.

CLARENCE S. HOUGHTON.

Subscribed and sworn to before me/
this 28th day of January, 1911. }

JACOB JNO. LAZARO,
Comm. of Deeds,
N. Y. City.

- (Endorsed:)—No. 14582.—U. S. District Court.
—In the Matter of Abram L. Canfield, Alleged Bankrupt.—Affidavit in Opposition.—Engel Brothers, Attorneys for Receiver, 132 Nassau Street, Manhattan, New York City.—U. S. District Court, S. D. of N. Y.—Filed Jan. 30, 1911.
- 42

Report of Special Master.

43

UNITED STATES DISTRICT COURT,**SOUTHERN DISTRICT OF NEW YORK.****IN THE MATTER***of***ABRAM L. CANFIELD,
Bankrupt.**

44

To the Judges of the United States District Court,
for the Southern District of New York.

On January 30, 1911, one William H. Burden
filed with the Court his verified petition herein
in the following words:

"UNITED STATES DISTRICT COURT,**SOUTHERN DISTRICT OF NEW YORK.****IN THE MATTER***of***ABRAM L. CANFIELD,
An Alleged Bankrupt.**

45

To the Honorable Judges of the United States
District Court for the Southern District of
New York.

The petition of William H. Burden respectfully
shows to the Court as follows:

- 46 That on the 18th day of January, 1911, a petition for involuntary bankruptcy was filed in this Court against Abram L. Canfield, and by an order of this court made on the same day, Clarence S. Houghton was appointed receiver for such alleged bankrupt, and said Houghton thereafter duly qualified as such receiver and entered upon his duties as such.

- That prior to the filing of said petition in bankruptcy, and on the 5th and 13th days of January, 1911, respectively, the said Canfield duly assigned and transferred to your petitioner, the accounts receivable set forth in the schedules hereto annexed, marked Schedules A and B, and at the time of said assignments, your petitioner paid to said Canfield in cash the sums of \$5000 and \$5628.60, respectively; and said assignments were received and said sums paid by your petitioner in good faith, and without any knowledge or notice that the said Canfield was insolvent or in failing circumstances.
- 47

That, as your petitioner is informed and believes the said receiver has collected on the accounts above mentioned from the persons owing the same, various sums amounting in the aggregate to more than One thousand dollars, all of which money is the property of your petitioner.

That annexed hereto and marked Exhibit C and is a copy of the agreement under which said assignments were made.

- 48 WHEREFORE, your petitioner prays for an order directing said receiver to pay over to your petitioner the moneys heretofore received by him on said accounts, and also directing that if any further sums shall be received by him from said debtors, he shall pay the same over to your petitioner forthwith.

Dated, New York, January 26th, 1911.

WILLIAM H. BURDEN,
Petitioner."

Thereafter Clarence S. Houghton, the Receiver
 herein, filed his affidavit in opposition to said pe-
 tition, which affidavit was as follows: 49

“UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

In the Matter	}
of	
ABRAM L. CANFIELD, alleged Bankrupt.	

50

Southern District of New York, ss.:

CLARENCE S. HOUGHTON, being duly sworn, deposes and says that he is the receiver appointed herein and that he has duly qualified as such.

That at the time of taking possession of the place of business of the bankrupt at No. 97 Beekman Street, one William H. Burden was on the premises and claimed to hold assignments of a number of account.

That the said Burden informed deponent that he had advanced to the alleged bankrupt the sum of \$10,628 for which the said bankrupt had assigned the accounts to said Burden as collateral security. 51

Deponent further says that he has made a cursory examination through his attorneys of the facts set forth in the petition of William H. Burden, which petition is dated and verified the 26th day of January 1911. That deponent has been unable to discover entries in the cash book or bank pass book of the bankrupt showing the receipt of \$10,628 from the said William H. Burden; on the contrary your deponent calls the attention of this Court to the facts that the bank pass books of the bankrupt show a deposit of about \$8,500 in the

52 month of January and taking into consideration the large amount of business done by the bankrupt and the large amount collected on the outstanding accounts, deponent alleges that there is reason to doubt that the said William H. Burden actually advanced the sum mentioned in his petition on the 5th and 13th day of January, 1911.

Deponent has arranged to conduct an examination of the alleged bankrupt under Section 21A which is scheduled for Wednesday the 1st of February and deponent would also like to examine the petitioner, William H. Burden, and see his checks which he claimed he gave to the alleged bankrupt for the assignment of these accounts.

53 Deponent therefore suggests that the motion of this petitioner be denied at this time or else adjourned until the election of a Trustee.

In the meantime deponent is willing to keep a separate account of the moneys coming in on the accounts alleged to have been assigned to the said William H. Burden.

CLARENCE S. HOUGHTON.

Subscribed and sworn to before me/
this 28th day of January, 1911. (

JACOB JACO. LAZARO,
Comm. of Deeds,
New York City."

54 Said matter having been thereupon referred to me for examination, testimony and report, I do hereby report as follows:

I proceeded with a hearing of said matter and was attended thereon by Mr. John J. Crawford, attorney for said William H. Burden, the petitioner in question, and by Messrs. Engel Brothers, attorneys for said Receiver.

Proofs were made in regard to the matter in question, and the minutes of such proceeding are submitted herein.

The following appears by the proofs:

The petition in bankruptcy was filed herein on January 18, 1911.

Shortly prior thereto, and on December 14, 1910, Abram L. Canfield, the bankrupt herein, and said William H. Burden made and entered into an agreement in writing, as follows: 55

"THIS AGREEMENT, made this 14th day of December, 1910, between Abram L. Canfield, of the Borough of Manhattan, City of New York, party of the first part, and William H. Burden, of the same place, party of the second part, Witnesseth:

That in consideration of the premises and the mutual covenants and agreements herein-after mentioned, and of the sum of One Dollar paid by the party of the second part to the party of the first part at and before the en- 56
sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties hereto have agreed as follows, viz.:

I.—The party of the first part shall assign and transfer to the party of the second part approved accounts due from reputable debtors, and the party of the second part shall pay therefor a sum equal to seventy-five per cent of the total amount thereof, not to exceed however Ten thousand Dollars, unless he shall elect to advance a larger sum.

II.—The said accounts shall be for goods sold and delivered in good faith to the respective persons against whom the accounts exist, and in all cases, the said goods shall have 57
been accepted by such persons.

III.—All accounts assigned under this agreement shall result from the sale of goods shipped either from the place of business of the party of the first part in the City of New York, or from one of the following factories:

Walker & Pratt Mfg. Co., Boston, Mass.
American Stove Co., Cleveland, Ohio.
Excelsior Stove & Mfg. Co., Quincy, Ill.
Cleveland Co-operative Co., Cleveland,
Ohio.

Victor Stove Co., Salem, Ohio.
Liberty Stove Co., Philadelphia, Pa.
Belding-Hall Co., Belding, Mich.

58

Metal Stamping Co., Jackson, Mich.

Novelty Mfg. Co., Jackson, Mich.

W. M. Crane Co., New York City.

IV.—Where the goods sold shall be shipped from the place of business of the party of the first part, the original shipping receipts covering the shipment referred to in the account shall be submitted to the party of the second part for his inspection at the time of the assignment of the account, and where the goods shall be shipped from one of the factories aforesaid, the invoice sent by the said factory to the party of the first part shall be submitted in like manner.

59

V.—The party of the first part shall act as the agent of the party of the second part in collecting the said accounts, but as remittances shall be received therefor, the checks and drafts shall be immediately delivered to the party of the second part, so endorsed as to make them payable to him.

60

VI.—The party of the first part hereby guarantees that each account so to be assigned will be paid within ten days after the same shall become due, and if any such account shall not be so paid, the party of the first part shall pay to the party of the second part the full amount thereof, after ten days notice in writing, and thereupon the party of the second part shall re-assign the same to the party of the first part; and if the party of the first part shall fail to so pay the amount of any such unpaid account, the party of the second part, at his election, may revoke the agency of the party of the first part to collect any of said accounts then uncollected.

VII.—The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent per month upon

whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain uncollected. 61

VIII.—Until all said accounts shall have been collected or re-assigned, the party of the second part shall have the right to examine at all reasonable times, the books of accounts and vouchers of the party of the first part, which examination may be made either personally or by his duly authorized agent.

IX.—When the amount collected on said accounts and turned over to the party of the second part shall amount to the total sum advanced thereon, with interest at the rate of six per cent per annum, and the party of the second part shall have received out of said collections his compensation for services as above mentioned, and all disbursements made or liabilities incurred, for exchange, or for attorneys' fees, or other expenses, in and about the collection of said accounts, he shall re-assign to the party of the first part all accounts then uncollected. 62

X.—Until the termination of this contract by mutual consent, all further purchases of accounts by the party of the second part from the party of the first part shall be subject to the terms hereof.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written. 63

ABRAM L. CANFIELD (L. S.)

In presence of

G. HESS.

ARTHUR J. KOEHLER,

for WILLIAM H. BURDEN.

WILLIAM H. BURDEN (L. S.)

On December 16, 1910, the following amendment was appended to said agreement:

“The list of factories contained in paragraph numbered III hereof, is hereby amended by the addition of the following 5 names:

- 64 Toledo Stove & Range Co., Toledo, Ohio.
 March Brounback Co., Pottstown, Pa.
 Roberts & Mander Stove Co., Philadel-
 phia, Pa.
 E. H. Huenefeld Co., Cincinnati, O.
 Century Mfg. Co., Johnstown, Pa.
 New York, December 16, 1910.
 ABRAM L. CANFIELD.
 WM. H. BURDEN."

- It will be observed that this agreement, while
 tending, at the commencement, to imply that the
 transfer of accounts was to be a sale, provides
 for the payment of interest on the advances, and
 65 concludes by providing for a re-assignment of
 any surplus of the accounts over such advances.

On December 15, 1910, the Fidelity & Casualty
 Co. of New York, executed and delivered a cer-
 tain bond, containing the following provisions,
 among others:

"THIS BOND WITNESSETH:

WHEREAS, Abram L. Canfield, of 97 Beek-
 man Street, New York City, hereinafter called
 the Obligee, a copy of which is attached here-
 to and made a part hereof:

- Now, THEREFORE, in consideration of a cer-
 tain premium, The Fidelity and Casualty
 Company of New York, hereinafter called the
 Company, does hereby agree that it will re-
 imburse the Obligee for the loss, not exceed-
 ing Seven thousand five hundred dollars, of
 any money or other personal property (1)
 66 through the sale, assignment, pledge, or
 transfer under the said agreement by the
 Principal to the Obligee, during the term of
 this bond, of any account wholly or partly
 fictitious; (2) through the failure of the prin-
 cipal during the term of this bond to deliver
 to the Obligee all money and other property
 received by the Principal during the said
 term on accounts sold, assigned, pledged, or
 transferred under the said agreement.

The foregoing agreement is subject to the following conditions: 67

* * * * *

"7. The Obligee shall duly observe and enforce all the provisions of the said agreement, except as such provisions may conflict with the following conditions, namely: a, The Obligee shall require the Principal to state in writing at the time of assigning each account, the date when the payment of such account is due, and if the payment of any account is not made within twenty days of the date that such payment is due, the Obligee shall immediately thereupon make demand by registered mail upon the debtor for the amount due; b, the Obligee shall require the Principal to file with the Obligee in connection with each account a certificate signed by a responsible official or employee of the Principal stating that the account referred to in the certificate represents a bona-fide sale, and that the merchandise concerned with the account has, prior to the signing of the certificate, been shipped to the customer named in the account; c, the Obligee, at least monthly, shall make an examination of the accounts of the Principal which shall embrace (1) a complete examination of the books, accounts, and vouchers of the Principal as respects the accounts covered under the said agreement; (2) a strict comparison between all unpaid accounts as such accounts appear on the records of the Obligee and as such accounts appear in the books of original entry of the Principal." 68 69

The premium upon this bond was paid by the bankrupt.

On December 16, 1910, under and in accordance with the foregoing agreement, said Burden paid to the bankrupt the sum of \$10,000 by two checks for \$5,000 each, and the bankrupt delivered to him 98 accounts, with assignments of the same to him which were absolute in terms.

70 On January 5, 1911, under and in accordance with said agreement, said Burden paid to the bankrupt the sum of \$5,000, in two checks, one for \$2,000, which was retained by the bankrupt and another for \$3,000, which was thereupon endorsed by the latter back to said Burden.

At the same time and under and in accordance with said agreement the bankrupt delivered to said Burden 46 accounts, with assignments of the same similar to the preceding.

On January 13, 1911, under and in accordance with said agreement, said Burden paid to the bankrupt the sum of \$5,628.60, by a check for said
71 amount, which was thereupon endorsed by the latter back to said Burden, and the bankrupt delivered to said Burden 63 accounts, with assignments of the same similar to the preceding.

Down to said time, the bankrupt, under and in accordance with said agreement, had collected from the 98 accounts so assigned on December 16, 1910, the sum of \$1,487.28, and paid the same over to Burden and on January 13, 1911, said Burden re-assigned to the bankrupt the balance of said 98 accounts remaining uncollected.

With respect to said checks for \$3,000 and \$5,-
72 628.60 respectively, it is shown that they were so endorsed back by the bankrupt to Burden in order to pay back to the latter the balance of the original advance of \$10,000, remaining unpaid after his receipt of the said collections, aggregating \$1,487.28.

It follows, therefore, that the total amount which Burden so advanced to the bankrupt was \$20,628.60; that of said amount the sum of \$1,487.28 was repaid to Burden by the collections in question, leaving a balance of \$19,141.32 and that the total amount repaid to Burden by the bankrupt by the endorsing back of said checks was \$8,628.60, thus

leaving a net balance unpaid to said Burden of \$10,512.72. 73

It is also shown that said check for \$5,628.60, so given and endorsed back, included the sum of \$115.88 for interest and per centage estimated to be due to said Burden under the agreement in question, upon said original loan of \$10,000.

It is contended by Burden, the petitioner herein, that such agreement, and such assignments of the accounts operated as an absolute sale of the latter to him.

In regard to such matter, Burden testifies as follows:

"Q. What distinction between an advance and a loan? A. I took them over as assigned accounts and he was to repay me the amount with six per cent, and at that time we talked about the position in the office. 74

"Q. How did the transaction differ from an ordinary loan with security? A. Differed in this way, that at that time we spoke of me taking a position in his office, which never came to pass.

"Q. Do you think that constitutes a difference? A. I was to secure a position if he had such an opening. He didn't have it.

"Q. You think because of that that the money wasn't a loan? A. A loan or an advance on his accounts; might be considered a loan. 75

"Q. You have said twice here I think it wasn't a loan; what was it if not a loan? A. It could be construed as a loan or an advance upon his accounts.

"Q. How do you distinguish between an advance and a loan? A. Perhaps it is the same thing."

* * * * *

"Q. Were you to get one per cent of the whole ten thousand dollars in addition to the six per cent? A. I advanced him ten thousand dollars and I was to get one per cent.

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"Q. In addition to the six per cent? A. In addition to the six per cent, so long as that ten thousand dollars remained out of my possession.

"Q. At what period were you to be paid this one per cent? A. There was no stated time for that one per cent. The agreement was to be paid at the time that he reimbursed me the advance with six per cent interest and the one per cent was to be computed in for services at the time said."

Arthur J. Koehler, a money broker, who negotiated the transaction in question, testified as follows:

77

"Q. But there was some conversation between Mr. Burden and yourself and Mr. Canfield in relation to the extra one per cent? A. I told Mr. Canfield it would cost him that much money.

"Q. And were you the first one that told Mr. Canfield that? A. I was.

"Q. Now, what led up to the discussion of the 1 per cent with Mr. Canfield? A. Why, naturally, Mr. Canfield wanted to know what it was going to cost him; he paid more money on previous loans.

78

"Q. Never mind about previous loans; about this loan; what led up to your telling Mr. Canfield he would have to pay 1 per cent extra? A. What led up to the facts? I told him the conditions on which the arrangements could be made with Burden.

"Q. What were these? A. That it would cost him on \$10,000, \$1,800 a year.

"Q. Did you explain how it would cost him that? A. No, I told him that is what it would cost him."

The following statement is made herein by the attorney for Burden:

Mr. Crawford.—I offer in evidence the original list of accounts delivered by Mr.

Canfield to Mr. Burden on the 5th day of January, 1911, and headed List of Accounts this Day, January 5th, sold and assigned by A. L. Canfield to W. H. Burden, etc. 79

Mr. Crawford.—I offer in evidence the paper signed by A. L. Canfield and delivered by him to William H. Burden on January 13, 1911, and headed List of Accounts this day Sold and Assigned by A. L. Canfield to W. H. Burden, etc.

The Referee.—An absolute sale of the accounts?

Mr. Crawford.—Yes, sir, the absolute assignment of the accounts. But there was a stipulation that when the accounts were collected Mr. Canfield had an equity in the balance that might be due afterwards." 80

In view of the foregoing, and of the very contradictory terms of the agreement in such regard, as hereinabove shown, and considering all the proofs herein, I am of the opinion that it is too plain for argument that the accounts in question were not sold to Burden, but were merely pledged with him as collateral security for loans.

It is contended by the Receiver that by reason of the provision of the agreement that Burden should receive one per cent per month as compensation for certain labor and services to be performed by him, the agreement in question is usurious and therefore, wholly invalid and inoperative. 81

In connection with this matter Burden testifies that in October, 1910, he first met the bankrupt, presenting to him a card of introduction from said Koehler, the money broker; that Koehler had told him that the bankrupt "wanted to get the use of some money on his book-accounts"; that he, Burden discussed with the bankrupt "the subject of buying his sales accounts, of advancing him money on his sales accounts"; that it was "a short

82 discussion upon the subject of advancing on his book account"; that Burden proposed to make the advances upon receiving employment in the bankrupt's office at \$50 per week; that the "deal" was not consummated at that time; that Koehler then told him that he could get an indemnity bond; that thereafter he had another interview with the bankrupt; that "the substance of such interview was as set forth in the contract."

The witness further testifies as follows:

83 "Q. You tell me what you remember of it irrespective of the contract, what you said and what he said, just as you remember it? A. That he would pay me six per cent interest and he would furnish me his bond of indemnity.

"Q. What else would he pay you? A. I required of him in consideration of service that the indemnity company required of me to pay me a compensation for that.

"Q. I don't quite understand what service the indemnity company required of you that you were to charge Mr. Canfield for? A. It is stated in the contract.

84 "Q. I don't see anything stated there; what was the duty that you were to perform by which you would charge Mr. Canfield an extra per cent? A. I was required by the bond to examine his shipping receipts at the time of making this advance to him, and then subsequently during the month I was to examine his books minutely as regards these sales accounts that might be transferred to me or assigned to me."

"Q. Did you talk that over with Mr. Canfield, about the requirement of the indemnity bond? A. I told him that I would get up a memorandum of agreement.

"Q. Let us go back to the indemnity bond. Did you tell Mr. Canfield what you would be required to do under an indemnity bond?

A. I found out by reading the bond what it would be. 85

"Q. So that at the time that you talked about this arrangement with Mr. Canfield and that you were to charge him six per cent and some other per cent for something else, you didn't know what that extra charge would be for? A. Yes, I arrived at that and told him it would be two per cent.

"Q. How did you arrive at that? A. I told him two per cent on the amount outstanding of the money for services in doing the work required by the Bond and Fidelity Company."

* * * * *

"Q. No, I beg your pardon; I made a mistake; one per cent a month for services." 86

"Q. And your services as you say were for the examination of the accounts? A. Yes."

* * * * *

"Q. But we are through with that; you discarded that and came to another arrangement after you had heard about a bond. Didn't you ask Mr. Canfield for two per cent a month for these alleged services? A. I can't remember that I did; possibly though; I can't remember that I did ask him for two per cent a month."

* * * * *

"Q. Were you to be paid at one per cent at the time you made the loan or after the accounts were to be collected? A. The percentage that I was to have for my services which is one per cent a month, was to be at the time the settlement was closed for the accounts, when I had received a sufficiency to reimburse the amount that I had advanced with six per cent interest I was then to be paid at that time the amount, I mean to be paid one per cent for the time the money was outstanding. 87

"Q. But upon what were you to reckon that one per cent?

Mr. Crawford.—Same Objection.

The Referee.—Same Ruling.

88

Mr. Crawford.—Exception.

A. It was to be upon the amount that was outstanding from my hands, from my possession."

* * * * *

"Q. Were you to get one per cent of the whole ten thousand dollars in addition to the six per cent? A. I advanced him ten thousand dollars and I was to get one per cent.

"Q. In addition to the six per cent? A. In addition to the six per cent, so long as that ten thousand dollars remained out of my possession.

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"Q. At what period were you to be paid this one per cent? A. There was no stated time for that one per cent. The agreement was to be paid at the time that he reimbursed me the advance with six per cent interest and the one per cent was to be computed in for services at the same time.

"Q. Wasn't that one per cent a bonus? A. It was for services; I didn't understand it as a bonus. There were certain services and it was only a reasonable charge for the services."

* * * * *

"Q. Who procured that surety bond? A. He procured it.

"Q. Did he pay for it or you pay for it? A. I didn't pay for it.

90

"Q. He procured the surety bond? A. Yes, sir."

* * * * *

"A. I submitted to him a memorandum of an agreement which had that reference to attorney's fees there."

* * * * *

Mr. Crawford.—State what you did, Mr. Burden, just what you did? A. I examined the vouchers and shipping receipts, vouchers for delivered goods, shipment of the goods.

"Q. And do you want the Court to understand that vouchers are books? A. They are not books.

* * * * *

Mr. Crawford.—So far as the books are concerned state what you did with respect to those books? A. I don't claim I made an examination of the books." 91

* * * * *

"Q. Upon cross-examination you state that you made a partial examination of the books; now, please state just what you did? A. I compared the statements of accounts with the ledger and also compared the different shipments in the Statements with the shipping receipts and invoices.

"Q. When was that done? A. That was on the 16th of December.

"Q. How long were you occupied with that on the 16th of December? A. Pretty much all day; I commenced about 10 o'clock in the morning and worked until 6 o'clock in the afternoon, save half an hour for lunch. 92

"Q. Did you make any further examination of any sort or comparisons? A. I did in January.

"Q. Yes, well on what date in January? A. January 5th.

"Q. What did you do on January 5th? A. Examined the shipping receipts and invoices of shipments to Canfield.

"Q. How much time did that take on the 5th of January? A. I worked about half a day.

"Q. Did you make any further examination or comparisons? A. Yes, on the 13th of January I made another examination. 93

"Q. And what did you do then? A. Examined the shipping receipts for the shipments embraced in the statements of account that he assigned to me.

"Q. How much of your time did it take on the 13th of January? A. About half a day.

"Before executing the contract with Mr. Canfield did you make an estimate of the amount of time that it would require for you to examine the shipping receipts covering the shipments in the accounts to be assigned and

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make at least monthly an examination of the accounts of Mr. Canfield which should embrace a complete examination of the books, accounts and vouchers of Mr. Canfield as respects the accounts covered under the assignment and a strict comparison between all unpaid accounts as such accounts appeared on the records of Mr. Canfield and as such accounts appeared on the books of original entry; I ask you if you made such an estimate? A. Yes, sir.

95

"Q. What was your estimate at that time; how did you make it up? A. I estimated that the work of examining the books and shipping receipts required, would take from 5 to 6 days each month.

"Q. On what basis? Well, state how you made up your estimate; how you got it out? A. There was a further answer to that.

"Q. Go on and state? A. I said 5 or 6 days.

"Q. Now, state how you made up that estimate?

Mr. Engel.—I object to what the witness thought it would take him.

96

A. Under the requirement of the bond I estimated in addition to the 5 or 6 days that was mentioned that there was a possibility that I would be required to give considerable additional time for the reason that in case the accounts were not paid promptly I would have to give notice to the debtors under the requirements of the bond.

A. And that in that case I would have to notify the debtors of the assignment to me, and it was required that I should do that service by registered mail. I would also have to take up the collection of the accounts, which would involve additional work and time and trouble."

* * * * *

"Q. Had you at any time any intention to charge more than 6 per cent for interest on the advance? A. No, sir.

"Q. And that was intended by you to be a charge for services exactly as it is stated in the bond? A. It was. 97

"Q. Was that on your part intended as a subterfuge to cover any usury charge? A. It was not.

"Q. Was that inserted there in perfect good faith? A. It was."

* * * * *

"Q. What experience did you have? A. I had almost a lifetime's experience as a book-keeper and accountant.

* * * * *

"Q. Now, Mr. Burden you made this loan to Mr. Canfield for profit, did you not, you wanted to make some money on your own money? A. I wanted the interest and an additional percentage for my services as required. 98

"Q. But you made this loan for the purpose of making this 6 per cent interest? Isn't it; this loan of \$10,000? A. Yes, sir.

"Q. Now, then, let me ask you, you testified at a previous hearing that you borrowed this money? A. I did temporarily, yes, sir.

"Q. From whom did you borrow this money? A. The Corn Exchange Bank.

"Q. Weren't you required to pay them 6 per cent interest for that same amount of money? A. I got it for less.

"Q. How much? A. For 5 per cent. 99

"Q. So now you want to change your testimony to say you made this loan for a profit of 1 per cent or 6 per cent? A. What question do you ask me; I don't see."

Arthur J. Koehler, the broker in question testified that he first met Burden in April, 1910, in consequence of an advertisement of Burden's in the Herald; that after such meeting he called on the bankrupt and told him he "had a client who could lend him \$10,000 upon security provided he could get a position in his business";

100 that he thereupon arranged for a conference between the Bankrupt and Burden; that "no negotiations were consummated at that time."

The witness further testified as follows:

"Q. Well, now, after you found that out, didn't you then have another conversation with Mr. Burden with respect to some other form of making this loan? A. Before the contract was signed?

"Q. Yes? A. Yes.

101 "Q. Will you give us that conversation? Please? A. I said to Mr. Burden that provided the new statement was satisfactory to him, would he make some arrangement with Mr. Canfield provided Mr. Canfield would give security bond and Mr. Burden told me that the Fidelity & Casualty Co. Bond provided for certain work and contingencies and it seemed to him a satisfactory way of concluding business with Mr. Canfield, and if the statement was satisfactory he would make some arrangement with him.

"Q. Didn't you say before that you told Burden about this bond proposition? A. Yes.

"Q. Well, didn't you say a few moments before that Mr. Burden told you about the bond proposition? A. I did not.

"Q. You are sure about that? A. Pretty sure."

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* * * * *

"Q. Now, after the conversation about the statement did you send him again to Mr. Canfield? A. I did.

"Q. And what was the conversation leading up to his going to Mr. Canfield, after 5 weeks? A. Well, Mr. Burden had been to the Fidelity Company and seen the bond and he said under that, this bond, he thought probably some arrangement could be made with Mr. Canfield provided he was willing to pay him so much for his services—one per cent per month on the money so advanced."

* * * * *

"Q. Well, tell me what the discussion was about, the 1 per cent; this is the first time we have heard you talked with Mr. Canfield about the 1 per cent? A. I told Mr. Canfield what the terms were going to be, of course. 103

"Q. What did he say? A. I told him Mr. Burden wanted 1 per cent a month to cover his services in the matter as provided in the Fidelity & Casualty Bond."

* * * * *

"Q. Did you know who was to prepare the contracts? A. Why yes, Mr. Burden told me his lawyer.

"Q. But you had not any talk with either Mr. Canfield or Mr. Burden as to what the contents of those contracts should be or the terms? A. I talked it over with Mr. Burden in this way; and he told me that the Fidelity Company insisted upon having a contract drawn in a certain way, that he had to have the contract drawn to conform to their views." 104

* * * * *

"Q. Was the bond in the office of Mr. Canfield at the time the contract was signed? A. I don't know.

"Q. Did you see it? A. I did not.

"Q. Was there anything said by Mr. Burden or Mr. Canfield about the bond at the time this contract was signed? A. I think that Mr. Burden said that we would have to take those contracts to the Fidelity Company so as to have the bond issued." 105

The witness further testifies that he was present in the bankrupt's office on December 16, 1910, and saw the agreement in question executed; and that he appended his name thereto as witness for Burden.

The witness further testifies as follows:

"Q. Was anything said at that time about—respecting the stipulation in the contract for compensation to be paid for services to be performed? A. There was not.

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"Q. Was anything said about a bonus? A. There was not.

"Q. Was the subject of usury mentioned? A. No.

"Q. Was the word usury used? A. No.

"Q. Was the word 'usury charge' used? A. No.

"Q. In any conversation that you had with Mr. Canfield was the subject of Mr. Burden becoming a partner mentioned? A. No."

* * * * *

"Q. Did you tell Mr. Burden anything about a bond which the Fidelity & Casualty Company was issuing? A. I did.

107

"Q. Then, further negotiations were taken up with Mr. Canfield upon the basis of his giving the—giving one of these bonds? A. Yes, sir, a bond from the Fidelity & Casualty Company."

* * * * *

"Q. But you say you were there a half an hour? A. I mean during the whole time.

"Q. That was a half an hour? A. I think so.

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"Q. And all that was said or done was the reading of this paper composed of 4 pages and the signing of them, and that took half an hour? A. I don't say all that was said and done. In the first place we had to wait for Mr. Canfield to come in and then the papers were signed, and then we may have talked of other matters; I don't know; I don't say that was all that was talked about, but I mean as far as that particular contract is concerned."

"Q. (Repeated)? A. There was nothing spoken at all, except Mr. Canfield came in, read the paper and said it was all right.

The Referee.—Is that correct? A. As far as I can remember."

ABRAM L. CANFIELD, the bankrupt, testifies that Burden called upon him with an introduction from Koehler. 109

The witness further testifies as follows:

"Q. Did you then ask him to loan you \$10,000 or any sum of money? A. Mr. Burden's first talk was to become a partner into the business, to loan us \$10,000 or put \$10,000 into the business and to derive an income of \$250 per month for that interest, that \$10,000. He figured, and his proposition at that time was, that he was entitled to a 6 per cent interest, that charge per year, and he talked about a 2 per cent a month extra.

"Q. Yes. A. Now, he talked about working an hour or two a day and that that might suit him. He asked at that particular time for a statement of our business which was handed to him." 110

* * * * *

"Q. He went away and said he would come again, which he did a few days later.

"Q. Did you have a conversation when he called again? A. I did.

"Q. State the conversation, please? A. I said that we would not pay as much bonus as Mr. Burden asked for which was, understand, 6 per cent and 2 per cent per month. We could not afford to pay as much as that for the money to be put into the business and Mr. Burden said also that he would not—he would withdraw his proposition relative to doing any work there; there was now no work really that he could do, so the first proposition fell through. Now, another proposition was submitted by Mr. Burden in which he would simply loan us the money and take as security assigned accounts, and loan us \$10,000." 111

* * * * *

"Q. State the conversation? A. Why, then the proposition was put to me by Mr. Burden that he loan \$10,000 and first asked for 2 per cent bonus. We said we could not

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afford to pay it, and then he agreed to loan us \$10,000—.

Mr. Crawford.—I move to strike out what he agreed to do.

The Referee.—State what he said, in substance?

A. He said he would loan us \$10,000 on this basis, 6 per cent legal interest and 1 per cent per month, making in all 18 per cent.

“Q. Did Mr. Burden use the words bonus of 1 per cent a month at the time you had this conversation? A. Yes.

“Q. Did he say to you I want 6 per cent legal interest in addition to 1 per cent bonus every month for making this loan? A. Yes.”

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“Q. If I understood you before you said Mr. Burden at first asked for 2 per cent bonus per month? A. Yes, sir.

“Q. And at the second meeting it was finally arranged you pay 1 per cent to which both of you agreed? A. Yes, sir.

“Q. Who is Mrs. Herzog? A. My Secretary.

“Q. Was she present at any of these meetings? A. Present at all of them.

Q. She occupied the same room, the same desk? A. Her desk adjoins mine.”

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“Q. After this agreement for the loan of this money was consummated did Mr. Burden tell you he would call on his lawyer and bring back the written agreement? A. Yes.

“Q. Did you read this agreement? A. Well, I have only glanced it over.

“Q. Well, glance it over; did you notice in that agreement something pertaining to services to be rendered on the part of Mr. Burden? A. Yes, at the time the agreement was—.

“Q. Did you notice it? A. Yes, at the time the agreement was—.

“Q. Did you notice it? A. Yes.

“Q. Well, now, when you noticed that did he or you say to Mr. Burden—.”

In regard to this last mentioned matter the witness testifies as follows: 115

"Q. Well, now, when you noticed that did you say to Mr. Burden—.

"Q. At the time this agreement was brought to you I refer to? A. Yes, sir.

"Q. And you looked at the agreement and you noticed the clause about services to be rendered? A. Yes, sir.

"Q. What did you say to Mr. Burden? A. I asked Mr. Burden just what he meant by that clause; why, he said that that was simply to get around the usury law; there were no services to be rendered at all."

This testimony is flatly contradicted by Burden, who also denies that he ever used the language in question. He also denies that he ever used the word "E us" or the word "usury" in connection with any of the matters in question. 116

The witness, Koehler testifies that he was present at the time in question, but did not hear any such language used by Burden.

The bankrupt further testifies as follows:

"Q. Did Mr. Burden render any services to you of any kind? A. No, sir.

"Q. Did Mr. Burden ever examine your books? A. Not to my knowledge, no.

"Q. Except at the time you gave Mr. Burden the assignment of the accounts and Mr. Burden examined your shipping receipts to ascertain whether you had shipped the goods, did he afterwards axamine any shipping receipts or any books of yours? A. No, he never did. 117

"Q. Did he ever render any other services to you of any kind? A. No, sir."

* * * * *

"Q. You said you said to Mr. Burden you were hard pressed for money? A. I haven't used the words hard-pressed.

118

"Q. What did you say to him about your necessities? A. That we needed the money and could use it."

Sadie Herzog, formerly "S. Hess," testifies that she was in the employ of the bankrupt for 15 years, that her desk was about 10 feet from his; that she was present at meeting between the bankrupt and Burden about two months or so before the bankruptcy at which Burden made a certain proposal to lend \$10,000; that very shortly thereafter Burden came back with another proposition.

The witness further testifies as follows:

119

"Q. Then I heard Mr. Burden say to Mr. Canfield that he would agree to allow him \$10,000 on assigned accounts and for this loan he would agree to give him 6 per cent—Mr. Burden said this—6 per cent and 1 per cent as a bonus, which was to cover the—

"Q. Just give us the conversation?

Mr. Crawford.—She is giving the conversation.

A. That was the 1 per cent bonus.

Mr. Crawford.—Which was that, go on from where you were interrupted; which was to cover—

A. To cover the bonus and usury charge.

120

Mr. Crawford.—I move to strike out usury charge; you didn't hear the word usury did you? A. Yes, I heard it; it was to cover the usury charge.

"Q. You heard them use that word? A. I certainly did, yes. Then Mr. Canfield told Mr. Burden he didn't have any use for him in the office to do any work; we had no work for Mr. Burden in the office, and then—

"Q. Are you referring to the conversation when Mr. Burden brought the agreement to Mr. Canfield? A. Well, this was the second time.

"Q. Well, after the second time that you call it, did Mr. Burden call with an agreement? A. I don't remember now.

"Q. I show you this paper and I ask you if you ever saw that before? A. Yes, I saw that. 121

"Q. Do you recall Mr. Burden bringing this paper to Mr. Canfield? A. Yes.

"Q. Isn't that the time you refer to as to the conversation concerning the usury charge or bonus? A. I think it was."

* * * * *

"Q. Isn't it a fact that Mr. Canfield asked Mr. Burden what was meant in this agreement concerning services and charges for services to be rendered by Mr. Burden?

Mr. Crawford.—Objected to as leading.

The Referee.—Sustained.

"Q. What did you hear Mr. Canfield say concerning this agreement shown you? A. I don't remember. 122

* * * * *

"Q. Did Mr. Burden, as far as your knowledge goes, render any services to Mr. Canfield? A. No, he did not.

"Q. Did Mr. Burden ever examine the books of Mr. Canfield? A. No, he did not.

"Q. With the exception of the time that these assignments of accounts were made by Mr. Canfield to Mr. Burden did Mr. Burden ever examine any shipping receipts in Mr. Canfield's place of business? A. Yes.

"Q. When? A. At the time the statements were made up he wanted to see the shipping receipts covering all these different items on the statements and they were shown to him. 123

"Q. That was at the time that these accounts were made up? A. At the time that these accounts were made up.

"Q. Did Mr. Burden ever again after that examine any shipping receipts? A. No, he did not."

* * * * *

"Q. And where were you at the time? A. At my shipping desk.

"Q. You weren't in the room with them? A. No, I was at the shipping desk with the windows open.

124

"Q. How far away was that? A. Directly in back of Mr. Canfield's desk there is a partition, a small partition and the windows were open, they are always open.

* * * * *

"Q. So that at the time that you say you overheard these conversations between Mr. Burden and Mr. Canfield you weren't actually in the room? A. No, I wasn't in the room.

"Q. You were on the other side of the partition? A. On the other side.

* * * * *

125

"Q. This partition you speak about, how thick was this? A. Oh, you could hear anybody, could hear anything.

"Q. How thick was it, about half an inch? A. An inch, half an inch or an inch.

"Q. And your desk was close with the partition? A. Right up with the partition exactly.

"Q. And Mr. Canfield's desk was close to the partition on the inside? A. Yes, sir.

"Q. Practically set back to back? A. Yes, sir, back to back.

"Q. And the windows were open? A. Yes.

"Q. And you heard the conversation clearly? A. Yes, you can hear all that is said there."

126

Upon a careful consideration of the foregoing and of all the proofs made I am satisfied that Burden was not employed in any bona fide way to render services, either to the bankrupt or to the Fidelity and Casualty Company; and that the arrangement, as contained in the agreement so made by and between the bankrupt and said Burden, by which said Burden was to receive one per cent per month on his advances "as compensation for the labor and services to be performed and time to be expended by him in making the examinations required by the terms of the bond exe-

cut by the Fidelity and Casualty Company of New York," was not made in good faith, or with the intention that such per centage should be paid for such purpose, but that such arrangement was intended to be and in fact was devised to cover a scheme, that said Burden should receive more than legal interest on his advances to the bankrupt. 127

I accordingly further report that in my opinion the agreement in question was usurious and wholly void, that the bankrupt estate is not indebted to said William H. Burden the petitioner herein, in any amount; that the petition of said Burden should be denied; that so far as appears 128 the Receiver has no money or other property belonging to said Burden; that the accounts so assigned by the bankrupt to said Burden, on January 5 and 13, 1911, respectively, are the property of the bankrupt estate; that they should accordingly be assigned and transferred by said Burden to the Receiver herein and that said Burden should be ordered to assign and transfer them accordingly.

May 27, 1911.

Respectfully submitted,

WILLIAM H. WILLIS,

Referee in Bankruptcy as Special Master. 129

(Endorsed:) — United States District Court, Southern District of New York.—No. 14582.—In the Matter of Abram L. Canfield, Bankrupt.—Report of Special Master on Petition of William H. Burden for an order directing the Receiver to pay over certain moneys.—William H. Willis, Referee in Bankruptcy, 80 Wall Street, New York City, N. Y.—U. S. District Court.—S. D. N. Y.—Filed June 1, 1911.

130 **Testimony Taken Before the Special
Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

IN BANKRUPTCY.

IN THE MATTER

of

ABRAM L. CANFIELD,
Bankrupt.

Before:
William H.
Willis, Esq.,
Referee in
Bankruptcy,
80 Wall Street.

131

New York, February 7, 1911, at 11 A. M.

HEARING ON RECLAMATION PROCEEDING OF
WILLIAM H. BURDEN.

PROCEEDED PURSUANT TO NOTICE.

APPEARANCES:

132

MR. C. S. HOUGHTON, Receiver.

MESSRS. ENGEL BROTHERS, Attorneys for Re-
ceiver represented by

MR. LAZAROE, Of Counsel.

MR. JOHN J. CRAWFORD, Attorney for Claim-
ant, representing

MR. WILLIAM H. BURDEN, Claimant.

William H. Burden—Direct.

133

WILLIAM H. BURDEN, the Claimant, called as a witness in his own behalf and being duly sworn, testified as follows:

Direct examination by Mr. Crawford:

Q. What is your full name? A. William H. Burden.

Q. Where do you reside? A. 612 West 140 St.

Q. City of New York, Borough of Manhattan? A. Manhattan.

Q. I show you a paper and ask you if that is the contract made between you and Mr. Canfield? A. Yes, sir. 134

Mr. Crawford.—I offer the paper in evidence.

(Paper marked in evidence Claimant's Exhibit A of February 7, 1911.)

Mr. Lazaro.—Objected to on the ground that it is not the contract set forth in the petition and has no bearing whatever upon the subject matter before your Honor.

The Referee.—Overruled.

Mr. Lazaro.—Exception.

135

Q. I show you papers purporting to be monthly statements by A. L. Canfield & Company with assignments attached thereto, and ask you if those were ever delivered to you and by whom? and when?

A. They were delivered to me by Mr. Canfield on the 5th of January, 1911.

Q. At the time that each of those statements was delivered was this slip attached to each one?

A. It was, yes, sir.

Mr. Crawford.—I offer those in evidence.

136

William H. Burden—Direct.

It is stipulated that the papers be marked as one exhibit, consisting of 46 papers.

(Papers marked in evidence as Claimant's Exhibit B of February 7, 1911, 46 papers.)

Q. I show you another paper and ask you what that is? A. That is a list of the assigned accounts, assigned on the 5th of January.

Q. Was that delivered to you by Mr. Canfield at that time? A. It was.

137

Mr. Lazaroe.—That is objected to as the assignments are in evidence.

The Referee.—You better file that list.

Q. I show you a check drawn to the order of A. L. Canfield, dated January 5, 1911, drawn on the Corn Exchange Bank, for \$2,000; is that your check? A. Yes, sir, that is my check.

Q. Did you deliver it to Mr. Canfield?

Mr. Lazaroe.—I object to the counsel leading the witness.

138

Q. What did you do with that check? A. I delivered it to Mr. Canfield.

Q. From whom did you afterwards receive it? A. The \$2,000 check?

Q. Yes? A. I got it back from the bank.

Q. You received it back from the bank? A. I received it back from the bank, to balance my account.

Q. It was in your returned vouchers? A. In my returned vouchers, yes.

Mr. Crawford.—I offer it in evidence.

(Check marked in evidence Claimant's Exhibit C of February 7, 1911.)

William H. Burden—Direct.

139

Q. I show you another check dated January 5, 1911, payable to the order of A. L. Canfield, for \$3,000, drawn upon the Corn Exchange Bank, and ask you whose that check is? A. That is my check.

Q. You are familiar with Mr. Canfield's handwriting? A. Yes.

Q. Is that his endorsement on the back? A. That is his endorsement on the back. I saw him endorse it.

Q. When Mr. Canfield endorsed that check what did he do with it? A. He delivered that check to me.

140

Q. Delivered it to you? A. Yes, sir.

Mr. Crawford.—I offer the check in evidence.

(Check marked in evidence Claimant's Exhibit D of February 7, 1911.)

Q. Those checks were delivered on the day of their date? A. They were.

Q. And at the same time that Mr. Canfield delivered to you the assignments which are marked in evidence Exhibit B? A. I delivered the checks the same day.

141

Q. Did you deliver the checks at the same time that he delivered to you the assignments which have been put in evidence and marked Exhibit B? A. I did.

Q. I show you 63 papers purporting to be monthly statements rendered by A. L. Canfield to different persons, with an assignment attached to each, and ask you who delivered those to you and when? A. Mr. Canfield delivered them to me on the date of the assignment, January 13.

Q. They were delivered to you on January 13, 1911? A. Yes, sir.

142

William H. Burden—Direct.

Mr. Crawford.—I offer those in evidence.
(63 papers marked in evidence Claimant's
Exhibit E, February 7, 1911.)

Q. I hand you a paper and ask you what that is? A. That is a list of assigned accounts of Mr. Canfield to me on the 13th of January.

Q. From whom did you receive it? A. From Mr. Canfield.

Q. Whose signature is that at the bottom of the second page? A. Mr. A. L. Canfield's.

143

Mr. Crawford.—I offer the list in evidence.

Mr. Lazaroe.—I object to that.

The Referee.—I sustain the objection.
File the list.

Q. I show you a check dated January 13, 1911, drawn on the Corn Exchange Bank, payable to the order of A. L. Canfield for \$5628. and ask you whose check that is? A. It is my check.

Q. In whose handwriting is the endorsement on the back? "A. L. Canfield"? A. It is in Mr. Canfield's handwriting.

144

Q. On what date did you deliver that check to Mr. Canfield? A. On January 13.

Q. 1911? A. 1911.

Q. Was that at the same time that he delivered to you the assignment which has been put in evidence and marked Claimant's Exhibit E? A. It is the check delivered to him at the time of receiving this assignment from him.

Q. These 63 papers which have been put in evidence and are marked Claimant's Exhibit E? A. Yes, sir, that's correct.

Q. Then what did Mr. Canfield do with that check? A. He endorsed it.

William H. Burden—Direct.

145

Q. After he endorsed it? A. Then he delivered it to me.

Q. What did you do with it? A. I deposited it in the bank.

Q. It came back to you? A. Came back to me as returned check.

Mr. Crawford.—I offer that in evidence.

(Check marked in evidence Claimant's Exhibit F, February 7, 1911.)

Q. I show you a check dated December 16, 1910, drawn on the Corn Exchange Bank, to the order of A. L. Canfield, for \$5,000 and ask you whose check that is? A. It is my check.

146

Mr. Lazaro.—I object to any testimony on December transactions. That has all been closed out. It is not before the court at this time.

The Referee.—Objection overruled.

A. It is my check.

Q. To whom did you deliver that check? A. Delivered it to Mr. A. L. Canfield.

Q. On what date? A. December 16, 1910.

147

Q. How did that check come back to you? A. From the bank, cancelled.

Q. Among your paid vouchers? A. Among my paid return checks.

Mr. Crawford.—I offer the check in evidence.

Mr. Lazaro.—Objected to as immaterial and irrelevant.

The Referee.—Overrule the objection.

Mr. Lazaro.—Exception.

(Check marked in evidence Claimant's Exhibit G of February 7, 1911.)

148

William H. Burden—Direct.

Q. I show you another check dated December 16, 1910, drawn upon the Corn Exchange Bank to the order of A. L. Canfield for \$5,000 and ask you whose check that is? A. That is my check.

Q. To whom did you deliver that check? A. To Mr. A. L. Canfield.

Q. On the date of the check? A. On the date of the check.

Q. How did that check come back in your possession? A. Came back through the bank as returned voucher.

149

Mr. Crawford.—I offer the check in evidence.

Mr. Lazaroe.—Same objection.

The Referee.—Overruled.

Mr. Lazaroe.—Exception.

(Check marked in evidence Claimant's Exhibit H of February 7, 1911.)

Q. At the time that these checks, Exhibits G and H were delivered to Mr. Canfield, did he deliver anything to you? A. He delivered to me assigned accounts.

150

Mr. Lazaroe.—Your Honor will take a general objection to all this testimony on the December transaction?

The Referee.—Overruled.

Mr. Lazaroe.—Exception.

Q. I show you a paper and ask you—on the third sheet of which you find the name A. L. Canfield, and ask you by whom that was delivered to you? A. Delivered to me by Mr. Canfield.

Q. On what date? A. December 16, 1910.

Q. Was there anything else delivered with it?

William H. Burden—Cross.

151

A. There was assigned papers agreeing with that list.

Q. Assigned papers in the form that we have in Exhibits B and E? A. In the same form.

Mr. Crawford.—I offer this in evidence, the list delivered by Mr. Canfield. Mr. Canfield's signature is on it.

Mr. Lazaroe.—That is objected to as there is no proof here of the assignment.

The Referee.—Objection sustained.

Mr. Crawford.—Exception.

152

Cross examination by Mr. Lazaroe:

Q. Mr. Burden, I show you Exhibit D of this date and ask you if it is not a fact that you deposited this check in your own bank on the same day? A. Yes, I deposited it the same day.

Q. You gave the check to Mr. Canfield and he endorsed it and immediately returned it to you? A. Yes.

Q. You gave him no cash at that time when he returned this check to you? A. I did give him cash at that time.

Q. Did you give him \$3,000?

153

Mr. Crawford.—I object to the question as calling for the conclusion of the witness.

The Referee.—I overrule the objection.

A. I did not in cash, no, sir.

Q. Isn't it a fact that Exhibit F of this date was deposited by you in your own bank on January 14? A. Yes.

Q. You gave this check to Mr. Canfield on January 13? and he immediately endorsed it over and returned it to you? A. Yes, sir, that's right.

154

William H. Burden—Cross.

Q. You gave him no cash consideration at the time he returned this check to you? A. I gave him a consideration; it was not cash though.

Q. Did you give him cash consideration at this time? A. No, I did not give him cash.

Q. What did you give him when that check was returned to you? A. I returned the uncollected accounts, amounting to something over \$11,000.

Subscribed to before me this }
day of , 1911. }

155

Referee in Bankruptcy.

Hearing adjourned to February 10, 1911, at 3 P. M.

156

UNITED STATES DISTRICT COURT, 157

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy.

IN THE MATTER

*of*ABRAM L. CANFIELD,
Bankrupt.

Before:
**William H.
 Willis, Esq.,**
 Referee in
 Bankruptcy,
 80 Wall
 Street.

158

New York, February 10, 1910, 3 P. M.

HEARING ON RECLAMATION PROCEEDING OF
 WILLIAM H. BURDEN.

PROCEEDED PURSUANT TO ADJOURN-
 MENT.

APPEARANCES:

MESSRS. ENGEL BROTHERS, Attorneys for Re-
 ceiver, represented by.

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MR. ADOLPH ENGEL, Of Counsel.

MR. CLARENCE S. HOUGHTON, Receiver.

MR. JOHN J. CRAWFORD, Attorney for Claimant.

MR. WILLIAM H. BURDEN, Claimant.

Mr. Houghton.—In compliance with the
 notice to produce, the Receiver produces 82
 accounts against different debtors, each
 bearing an assignment from A. L. Canfield
 annexed thereto.

(82 papers marked Claimant's Exhibit
 I for identification, February 10, 1911.)

WILLIAM H. BURDEN, the Claimant, Re-called.

Continuation of direct examination by Mr. Crawford:

Q. Were the accounts which have been marked Claimant's Exhibit I for identification some of the accounts that were delivered to you by Mr. Canfield on the 16th day of December, 1910? A. They were.

Q. When did you return them to Mr. Canfield?

A. On the 13th of January, 1911.

161 Q. Was that at the same time that Mr. Canfield delivered to you your check for \$5628? A. At that time, yes, sir.

Q. Did Mr. Canfield on December 16, 1910, deliver to you any accounts except these that are in this Exhibit I? A. Yes, sir.

Q. How many? A. There were sixteen.

Q. Sixteen besides those? A. Yes, sir.

162 Q. What accounts were those? A. L. Bauman & Co., \$917.50; Bishop & Bump, \$31; F. B. Callister, \$48.85; H. Christensen, \$12.75; L. Ettleson & Son, \$69; I. J. Gischer Furniture Company, \$115.25; I. Fleishman, \$219.50; Goerke & Company, \$11.32; Frank M. Groendyke, \$8.25; M. E. Hastings, \$9.30; Haugh & Fletcher, \$25.25; Johnston Hardware Company, \$101.05; L. Kaplan, \$22.45; W. Metzger, \$20.50; Cowperthwait, Van Horn & Company, \$336.20; Armbrust & Son, \$63.50.

Q. Were those accounts also returned to Mr. Canfield at the same time you returned these which are marked Exhibit I? A. Yes, sir.

Q. On the accounts for which the assignments were delivered to you on the 16th of December, 1910, did you make any collections? A. Yes, sir.

William H. Burden—Direct.

163

Q. How was the money collected? A. It was collected by Mr. Canfield.

Q. And then what did Mr. Canfield do with it? A. He turned it over to me.

Q. Did he turn over to you the check of the debtor or his own check? A. The check of the debtor.

Q. Is that a correct list of the accounts that were paid and the amounts that were paid thereon? A. Yes, sir.

By Mr. Houghton:

164

Q. How do you know that those are the correct amounts? A. The amounts came to me, the money came to me.

Q. Did you carry it in your memory? A. Oh no, I kept books.

Q. Is that a correct transcript from your books? A. Yes, sir.

Q. Have you got the books? A. I have at home.

Mr. Houghton.—I shall object unless I can see the book.

The Referee.—I sustain the objection.

165

By Mr. Crawford:

Q. Have you any paper in your possession that would refresh your recollection as to the accounts that were paid and the amounts that were paid? A. I have.

Q. Now upon looking at that paper and having your recollection so refreshed, can you state the accounts? A. I can.

Q. What are they? A. Lawrence Hardware Company \$41.98; John Looney, \$51.48; Berger Furniture Store, \$113.30; Cowperthwait & Son,

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William H. Burden—Direct.

\$51.12; L. Bamberg & Company, \$14.15; Headley & Whalen, \$112.48; W. P. Bridble, \$129.75; Max Kurlansburg, \$22.50; George & Company, \$200.56; Berger Furniture Store, \$68.90; Gaff Furniture Company, \$308.13; Union Sulphur Company, \$33.20; H. V. Carman Company, \$17.20; Mead & Taft, \$11.; L. Ettleson & Son, \$50.; A. Conwin, \$15.45; S. Bauman, \$65.75; Isthmian Canal Commission, \$24.80; C. G. Bailey, \$10.; S. C. Baker, \$13.36; Gatley Furniture Company, \$19.67; H. Kissel, Jr., \$12.50. Total amount, \$1,487.28.

167

Q. Is that all that you received on those accounts that were assigned to you by Mr. Canfield on the 16th day of December, 1910? A. Yes, sir.

Q. Did you before you made the contract with Mr. Canfield which is in evidence and marked Claimant's Exhibit A, require from him any statement as to the condition of his business? A. Yes, sir.

Q. Did he render you a statement in writing? A. Yes, sir.

Q. Is that the statement that was delivered to you? A. Yes, sir.

168

Subscribed to before me this
day of 1911.

Referee in Bankruptcy.

Mr. Crawford.—I offer that in evidence.

Mr. Houghton. I object as incompetent.

The Referee.—I sustain the objection.

Hearing adjourned to February 16, 1911, at
2 P. M.

William H. Burden—Cross.

169

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Bankruptcy.

In the Matter

of

ABRAM L. CANFIELD,
Bankrupt.

Before:
William H.
Willis, Esq.,
Referee in
Bankruptcy,
80 Wall
Street.

170

NEW YORK, FEBRUARY 16, 1911, 2 P. M.

HEARING ON RECLAMATION PROCEEDING
OF WILLIAM H. BURDEN

PROCEEDED PURSUANT TO NOTICE.

APPEARANCES:

MR. CLARENCE S. HOUGHTON, Receiver.

MESSRS. ENGEL BROTHERS, Attorneys for Re-
ceiver, represented by

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MR. ADOLPH ENGEL, Of Counsel.

MR. JOHN J. CRAWFORD, Attorney for Claimant.

MR. WILLIAM H. BURDEN, Claimant.

WILLIAM H. BURDEN, the Claimant, Re-called.

Cross examination by Mr. Houghton:

Q. Did I understand you to say at the last hear-
ing that you had been obliged to borrow some of

this money that you paid to Canfield? A. I chose to borrow it.

Q. How much? A. \$10,000.

Q. When did you borrow that? A. On the 15th of December, 1910.

Q. Have you produced at this hearing all the checks drawn by you to the order of Canfield? A. I have, yes, sir.

Q. Did Mr. Canfield pay you any cash from this 16th day of December up to his assignment? A. Any currency?

173 Q. Yes? A. No, sir.

Q. Did he ever give you any of his personal checks? A. No, sir.

Q. So that outside of the checks that you gave him and the checks he delivered to you from these assigned accounts, there was no other money transaction? A. No.

Q. How long have you known Mr. Canfield? A. Since October last, some time in October.

Q. How did you meet him? A. I had a card of introduction to him and called on him at his place of business.

174 Q. Was there anybody with you when you called? A. I don't remember that there was any one.

Q. Do you remember the name of the person that introduced you to Mr. Canfield? A. I do.

Q. What was his name? A. A. J. Koehler.

Q. What is Mr. Koehler's business? A. He is a broker I understand.

Q. When you first saw Mr. Canfield with this card of introduction, what did you say to him or what did he say to you? A. It is hard for me to remember all that was said.

William H. Burden—Cross.

175

Q. Well, try? A. I called on him to talk over the matter of entering into this deal with him, which I subsequently did.

Q. How did you know that he wanted to enter into any deal? A. I was so informed by his broker.

Q. Mr. Koehler? A. Mr. Koehler.

Q. What kind of a deal? A. He wanted to get the use of some money on his book accounts.

Q. Now after you saw him you discussed the subject, did you not, of Mr. Canfield's getting the use of some money? A. Yes, discussed the subject of buying his sales accounts, of advancing him money on his sales accounts. 176

Q. What was the transaction as far as you can remember?

Mr. Crawford.—I object if Your Honor please because the agreement between Mr. Canfield and Mr. Burden is in evidence. Any negotiations of that character are merged in the written instrument.

The Referee.—I overrule the objection.

Mr. Crawford.—Exception.

177

A. It was a short discussion upon the subject of advancing him on his book accounts.

Q. Well, you must be able to remember the exact details of that? That is very general, what you give me? A. It was upon the amount that I could let him have, that I could take over.

Q. Tell us that; what amount did he say he wanted? A. I think he wanted \$20,000, and it was my idea at the time probably to let him have \$20,000.

Q. So what did you say to that? A. It stood in abeyance that time as to the amount. We spoke

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William H. Burden—*Contd.*

of \$20,000, but it stood in abeyance. I required of him a statement of his financial condition and he was unable to furnish it. He was unable to furnish me a statement except one that had been standing, that he made out a year before.

Q. Before you got to that, wasn't there any discussion as to terms, on what basis you were to loan him the money?

Mr. Crawford. I object to that upon grounds previously stated.

The Referee. Overruled.

179

Mr. Crawford. Exception.

A. We spoke of an arrangement of this kind, that I would loan him on advance upon his sales accounts, and it was then proposed that I was to take a position in his office as a financial man in his office.

Q. At a salary? A. Yes.

Mr. Crawford. Objection.

The Referee. Overruled.

Mr. Crawford. Exception.

180

Q. How much? A. \$50 a week was the amount spoken of.

Q. Who suggested that, Mr. Campbell, or you? A. That was the terms I spoke to him of coming with him, if it would satisfy him.

Q. So as I understand you were to loan him \$10,000 and you were to take a position in his office at \$50 a week? A. I don't know that we referred to it as a loan. I was to take his sales accounts with a certain per cent. of margin in them.

Q. How did you term that when you talked with him?

William H. Burden—Cross.

181

Mr. Crawford.—Same objection.

The Referee.—Overruled.

Mr. Crawford.—Exception.

A. As an advance upon his sales accounts at 75 cents on the dollar.

Q. Was there anything said as to the amount of interest he was to pay? A. Yes, sir, six per cent.

Q. What else was he to pay for this loan? A. Nothing else for the loan, only for the services.

Q. What else?

182

By the Referee:

Q. What distinction between an advance and a loan? A. I took them over as assigned accounts and he was to repay me the amount with six per cent, and at that time we talked about the position in the office.

Q. How did the transaction differ from an ordinary loan with security? A. Differed in this way, that at that time we spoke of my taking a position in his office, which never came to pass.

Q. Do you think that constitutes a difference? A. I was to secure a position if he had such an opening. He didn't have it.

183

Q. You think because of that that the money wasn't a loan? A. A loan or an advance on his accounts; might be considered a loan.

Q. You have said twice here I think it wasn't a loan; what was it if not a loan? A. It could be construed as a loan or an advance upon his accounts.

Q. How do you distinguish between an advance and a loan? A. Perhaps it is the same thing.

William H. Burden—Cross.

By Mr. Houghton:

Q. You did not take a position? A. I didn't take the position and we didn't consummate the deal on that line.

Q. Then you discussed it on another line? A. Subsequently, yes, sir, some time afterwards.

Q. How long afterwards? A. Probably a month afterwards.

Q. What was the line that you next discussed? A. His broker suggested a different line.

185 Q. Mr. Koehler? A. Yes, sir.

Q. Was his broker with Mr. Canfield when the line was suggested? A. No, sir.

Q. Did he suggest it to you first, Mr. Koehler? A. He informed me that I could get an indemnity bond.

Q. From whom? A. The idea of my taking a position—that was my idea, that I could be in the office and see to the financial management of the business.

Q. You didn't need the position did you? A. I changed from that.

186 Q. You didn't require that position? A. Oh, I would have been glad to have had it.

Q. For the \$50. a week? A. Yes, sir.

Q. But at all events you didn't consummate that deal? A. No, sir.

Q. We will continue on with Mr. Koehler and the next proposed deal? Mr. Koehler stated something to you about an indemnity bond? A. That I could get an indemnity bond.

Q. You yourself get that? A. I think he informed me that I could get one indemnity bond.

Q. For what purpose? A. For guaranteeing the validity of the accounts, and that I could re-

ceive also the prompt payment of any money that might come into Mr. Canfield's hands of his assigned accounts.

Q. So that after you had received that information from Mr. Koehler, did you have another interview with Mr. Canfield? A. I did.

Q. What in substance was that interview? A. The substance of it was as set forth in the contract.

Q. You tell me what you remember of it irrespective of the contract, what you said and what he said, just as you remember it? A. That he would pay me six per cent. interest and he would furnish me his bond of indemnity.

188

Q. What else would he pay you? A. I required of him in consideration of service that the indemnity company required of me to pay me a compensation for that.

Q. I don't quite understand what service the indemnity company required of you that you were to charge Mr. Canfield for? A. It is stated in the contract.

Q. I don't see anything stated there; what was the duty that you were to perform by which you would charge Mr. Canfield an extra per cent.? A. I was required by the bond to examine his shipping receipts at the time of making this advance to him, and then subsequently during the month I was to examine his books minutely as regards these sales accounts that might be transferred to me or assigned to me.

189

Q. During what month were you to make that? A. During one month, during the pending of the outstanding of the assigned accounts.

Q. Did you talk that over with Mr. Canfield before anything was done with reference to the indemnity bond?

190

William H. Burden—Cross.

Mr. Crawford.—Same objection.*The Referee.*—Overruled.*Mr. Crawford.*—Exception.

A. The whole thing was talked over.

Q. Did you talk that over with Mr. Canfield, about the requirement of the indemnity bond?

A. I told him that I would get up a memorandum of agreement.

191

Q. Let us go back to the indemnity bond. Did you tell Mr. Canfield what you would be required to do under an indemnity bond? A. I found out by reading the bond what it would be.

Q. So that at the time that you talked about this arrangement with Mr. Canfield and that you were to charge him six per cent. and some other per cent. for something else, you didn't know then what that extra charge would be for? A. Yes, I arrived at that and told him it would be two per cent.

Q. How did you arrive at that? A. I told him two per cent. on the amount outstanding of the money for services in doing the work required by the bond of the Fidelity Company.

192

Q. We haven't any of us seen the bond yet? A. Mr. Canfield had been furnished with a copy of it.

Q. So you now remember that Mr. Canfield had the bond, a copy of it? A. Yes.

Q. You told him that you were to charge two per cent. per month? A. Two per cent. for my services.

Q. That was over and above the six per cent? A. Yes.

Q. And your services as you say were for the examination of the accounts? A. Yes.

By the Referee:

Q. You don't mean at the rate of two per cent. per annum? A. Two per cent. a month.

Q. What is the whole amount, 7 per cent? A. No, I beg your pardon; I made a mistake; one per cent. a month, for services.

By Mr. Houghton:

Q. Did you ask him first for two per cent. a month? A. I don't remember that I did.

Q. You have no recollection of that? A. No, it was six per cent. at first and \$50 a week for services as office manager; that was the first talk with him.

194

Q. Now the second talk was six per cent., and didn't you first ask him for two per cent. a month for these alleged services? A. No, sir, I only asked for six per cent and \$50 a week for services.

Q. But we are through with that; you discarded that and came to another arrangement after you had heard about a bond. Didn't you ask Mr. Canfield for two per cent. a month for these alleged services? A. I can't remember that I did; possibly though; I can't remember that I did ask him for two per cent. a month.

195

Q. Now on what were you to compute that two per cent?

Mr. Crawford.—That is objected to on the ground that it is specified in the contract.

The Referee.—Overruled.

Mr. Crawford.—Exception.

Q. On what were you to compute that two per cent., or how did you arrange in your conversation that you were to compute that two per cent.?

A. Not two per cent; six per cent. interest and one per cent.

Q. Well, one per cent. then? A. We computed it on the length of time that the money was—until the money was collected, and turned over to me on the accounts.

197 Q. Were you to be paid at one per cent. at the time you made the loan or after the accounts were to be collected?

Mr. Crawford.—I object to that on the ground that that matter is covered by the written instrument.

The Referee.—Overruled.

Mr. Crawford.—Exception.

198 Q. The percentage that I was to have for my services which is one per cent. a month, was to be at the time the settlement was closed for the accounts, when I had received a sufficiency to reimburse the amount that I had advanced with six per cent. interest. I was then to be paid at that time the amount, I mean to be paid one per cent. for the time the money was outstanding.

Q. But upon what were you to reckon that one per cent?

Mr. Crawford.—Same objection.

The Referee.—Same ruling.

Mr. Crawford.—Exception.

A. It was to be upon the amount that was outstanding from my hands, from my possession.

Q. Were you to get one per cent. of the whole ten thousand dollars in addition to the six per

cent.? A. I advanced him ten thousand dollars and I was to get one per cent.

Q. In addition to the six per cent.? A. In addition to the six per cent, so long as that ten thousand dollars remained out of my possession.

Q. At what period were you to be paid this one per cent.? A. There was no stated time for that one per cent. The agreement was to be paid at the time that he reimbursed me the advance with six per cent. interest and the one per cent. was to be computed in for services at the same time.

200

Q. Wasn't that one per cent. a bonus? A. It was for services; I didn't understand it as a bonus. There were certain services and it was only a reasonable charge for the services.

Q. Did you have any conversation with Mr. Canfield as to the time of the maturity of the accounts?

Mr. Crawford.—I object to that upon the ground that the matter is covered by the provisions of the written contract.

The Referee.—Overruled.

Mr. Crawford.—Exception.

201

A. Not before he made them out.

Q. Now you signed an agreement didn't you, which is in evidence? A. With Mr. Canfield?

Q. Yes? A. I did.

Q. Prior to the signing of that agreement was there any other arrangement as to the maturity of the accounts?

Mr. Crawford.—I object to that upon the ground that the arrangements of the parties, and all prior negotiations are merged in the written instrument.

202

William H. Burden—Cross.

The Referee.—Overruled.*Mr. Crawford.*—Exception.

A. The accounts were to be running to maturity; they were not to be past due or anything of that kind.

Q. Do you know what I mean? In other words would it be for thirty days or forty days or ten days? A. We spoke of sixty days and ninety days.

203 Q. What was the final arrangement as to the maturity of the accounts, was it 60 or 90 or shorter?

Mr. Crawford.—Same objection.*The Referee.*—Same ruling.*Mr. Crawford.*—Exception.

A. I required that he would offer accounts to me having 60 or 90 days to run; 60 and 90 days we spoke about.

204 Q. Now there is no mistake about that? Your understanding was that the accounts were to run 60 or 90 days? A. That was the kind that I spoke of.

Q. What kind did you decide upon finally?

Mr. Crawford.—Same objection.*The Referee.*—Same ruling.*Mr. Crawford.*—Exception.

A. I left it to him to make up the accounts; he had the accounts in his books and he submitted them to me and I found that the accounts were due April 1st and I made no objection.

Q. Didn't you have some arrangement whether the account was to be paid in one day or ten days

or sixty days? A. No definite arrangement of that kind.

Q. Your understanding was that the accounts to be assigned to you were accounts that were to mature in 60 or 90 days; that is so, isn't it? A. That's right.

Q. Now on this 14th day of December, 1910, you entered into this agreement, you have stated something in reference to a surety bond. Who procured that surety bond? A. He procured it.

Q. Did he pay for it or you pay for it? A. I didn't pay for it.

Q. He procured the surety bond? A. Yes, sir.

Q. Did you sign any papers in reference to that surety bond, any application or any agreement with reference to the surety bond? A. Only in the contract; there is a contract that refers to the bond between Mr. Canfield and me.

Q. You didn't in any way become a party to that bond except as your signature to this agreement? A. No, sir.

Q. Did you have a copy of that bond? A. I had the original; it was delivered to me.

Q. Did you have any arrangements with Mr. Canfield about charging for your attorney's fees?

A. No arrangement of that kind other than specified in the contract.

Q. What did you say to Mr. Canfield about attorney's fees?

Mr. Crawford.—Objected to as incompetent on the ground that the instrument appears to be complete on its face.

The Referee.—Overruled.

Mr. Crawford.—Exception.

208

William H. Burden—Cross.

A. I submitted to him a memorandum of an agreement which had that reference to attorney's fees there.

Q. What work was to be covered?

Mr. Crawford.—I object to that as a conclusion of the witness.

209

Q. I am asking if anything was said in the discussion as to what work these attorney's fees covered? A. We didn't discuss it otherwise than as expressed in the contract.

Q. Just for attorney's fees and nothing was said about it? A. Nothing outside of the contract that I remember.

Q. You were to pay a sum equal to 75 per cent. of the total amount of the loan? A. Yes, sir.

Q. What were you to do with the other 25 per cent?

Mr. Crawford.—I object to that upon the ground that the contract speaks for itself.

Mr. Houghton.—I will withdraw that question.

210

Q. Now this extra one per cent. Did you compute that extra one per cent on the \$10,000 which you advanced? A. I did for a few days while it was outstanding.

Q. Now we will get to the several assignments of accounts. The first assignment of accounts was on December 16, was it not? A. That's right.

Q. How much money did you loan to Mr. Canfield on the December account?

Mr. Crawford.—I object to the question upon the ground that it assumed that it

was a loan and places a construction upon the transaction.

Q. How much money did you hand over or pass over to Mr. Canfield for this December account?

A. I advanced him \$10,000 on December 16.

Q. What was the total amount of the accounts that were assigned to you? A. \$13,334.34.

Q. Who selected those accounts that were assigned to you? A. He selected them.

Q. Did you have anything to do with the selection? A. I passed on them as he submitted them to me—I accepted them.

212

Q. Where did he submit them to you? A. In his office.

Q. Were you in his office? A. I was.

Q. He selected the accounts as I understand and submitted them to you? A. Yes, sir.

Q. Did any of those accounts mature in less than thirty days? A. I think all of them matured according to his statements given me in less than thirty days.

Q. You examined the accounts then as he handed them to you? A. Yes, sir.

Q. Isn't it a fact that all of those accounts did not mature until thirty days or more? A. His statement showed they did not mature until January 1st.

213

Q. You examined the accounts? A. There was no date of maturity on the accounts. There was a printed form on the statements. He explained that that didn't hold as to the maturity of the account.

Q. If there was no statement on the accounts, wasn't it your understanding that those accounts should mature in less than thirty days? A. No,

sir. His list that he gave me at the time indicated that they matured the first of January.

Q. Now how much did you collect on those \$13,000 worth of accounts? A. I couldn't give you the exact amount. It is \$1,400 and some odd dollars. \$1,487. I think it is, but I can give you the exact amount.

Q. Give me the exact amount? A. (After looking at paper) \$1,487.28.

Q. That was all that you collected on those accounts up to January 5? A. Up to January 10 inclusive.

Q. Was that the day that you re-assigned the accounts back to him? A. No, sir, on the 13th of January.

Q. When was the next transaction that you had with Mr. Canfield with reference to these accounts? A. He made an assignment of another lot of accounts January 5.

Q. And you had not yet re-assigned the old accounts back to him? A. No, sir.

Q. Now what happened on January 5? A. On January 5 he made assignment of accounts to me on which I advanced him the \$5,000.

Q. What was the amounts of the accounts he assigned to you? A. The amount assigned to me on January 5 was \$6,776.31.

Q. For which you gave these two checks? A. One for \$3,000 and one for \$2,000, yes.

Q. How did it happen that this assignment of accounts was made on January 5? What led up to it? A. The object was to make a new assignment so that he could liquidate or take up the assignments previously made to me.

Q. But these assignments had not matured yet? A. Yes, the accounts were due.

Q. Were any of them past due? A. Some were past due and weren't paid.

Q. How many were past due and not paid? A. My recollection was they were nearly all past due on January 5.

Q. And had not been paid? A. And had not been paid, no, sir.

Q. Was that the only reason which led up to the transaction of January 5 that you recall? A. That is all, the only reason that I recall.

Q. Did he state why he wanted that money? A. No.

218

Q. Did you ask him why? A. It wasn't at his instance, it was at mine.

Q. What did you say to him? A. I required him to take a re-assignment of the first accounts because they had matured, or give me the money for them, or pay me the amount that I had advanced.

Q. But you were going to advance him more money weren't you? A. That was the plan of doing it, advance him on new accounts and deliver back to him the accounts which had matured and was unpaid, uncollected.

Q. So as a result of that you handed him two checks? A. Yes, sir.

219

Q. One of \$3,000 and one of \$2,000?

Q. On January 5 how much did you claim was due you? A. The difference between \$1,487. and the \$10,000, or slightly over \$10,000.

Q. How do you make \$1,487.? A. I had collected \$1,487. and I had advanced him \$10,000. It was the difference.

Q. So there was the difference between the amount you collected and the amount you had loaned him which you claimed to be due? A. Yes, sir.

Q. So you gave him \$5,000 for what purpose?

A. For the amount of accounts that he had assigned to me at that time.

Q. In other words you were to advance him the money and he was to pay you back with your money? A. He paid me back the check for \$3,000.

Q. So he paid you back with the money that you had loaned him? A. Yes.

Q. By delivering your own check back to you? A. Yes, sir.

221 Q. What did he do with the other check, the \$2,000 check? A. He kept it.

Q. So that on January 5 he owed you \$12,000 less \$1,400. that you had collected, isn't that so?

A. Yes, sir, and the interest and services.

Q. Did you charge him for interest and services? A. Not at that time.

Q. So that on the January 5 transaction no claim was made on that date for interest or the one per cent. for services? A. No.

Q. Now did you on that date re-assign the balance of the claims to Mr. Canfield? A. On the 13th.

222 Q. Why did you wait till the 13th? A. We waited on him to complete making up the accounts, waiting on him.

Q. Did you make up the accounts or did he? A. He made them up.

Q. Did you know how much had been paid you on the 5th of January? A. I did.

Q. What do you mean by making up the accounts? A. He made up the accounts that he wished to assign me. He was making up the accounts that he was going to assign me in lieu of the accounts which I was to return to him or re-assign to him.

Q. On what day was it that he made up the new accounts which he assigned to you in lieu of the old accounts? A. January 13.

Q. On January 13 did you re-assign him all the old accounts? A. I did.

Q. Do you remember what the amount was? A. I re-assigned him \$11,847.06.

Q. Had any of the accounts been collected between the 5th day of January and the 13th day of January? A. On what?

Q. On the December assignment, other than that you have testified to? A. January 10 was the last collection on December 16 assignment. 224

Q. And there were no collections between January 10 and January 13? A. Not on that assignment.

Q. Was there any between January 5 and January 10? A. Yes, sir.

Q. How much—this is on the December assignment; you have already stated the amounts collected January 10? A. January was the last date.

Q. You have already stated that amount? A. No, I have not given the amount of it.

Q. To make it simpler, give me the amount you collected from January 5 to the time that you re-assigned the accounts back? A. \$101.53. 225

Q. What did you do with that \$101.53 you collected? A. I credited it against the assignment of December 16th.

Q. Did you credit against that any interest or the extra one per cent.? A. The interest calculation had not been made at that time.

Q. Or the extra one per cent.? A. No, sir.

Q. On January 13 new accounts were assigned to you? A. Yes, sir.

Q. Did they include any of the old accounts, of the December accounts? A. Not that I know of.

Q. Who selected the new accounts? A. Mr. Canfield.

Q. And when were those accounts to mature? A. April 1, 1911.

Q. Why was it that those matured in three months and the December accounts in less than 30 days? A. He selected them, he made the selection.

227 Q. And you accepted that selection? A. I accepted them, yes, sir.

Q. What did you pay him when these new accounts were assigned? A. \$5628.60.

Q. What was the amount of the accounts assigned to you? A. The amount was \$7514.83.

Q. How did you happen to make out your check under date of January 13, 1911, for the amount \$5628.60? A. That was approximately I suppose 75 cents on the dollar, but it required that amount to take over the balance of the December 16 assignment, take over the uncollected accounts of December 16.

228 Q. But hadn't you given him the money to take over that already on January 5? A. No, sir, took \$3,000 of that \$5628. That made \$8628.

Q. To get right down to it, on January 13 how much was due you on the December assignment? A. \$5628.60.

Q. How much had been paid to you on the December assignment? A. \$1487.70 and the \$3,000 check delivered January 5.

Q. Then you re-assigned the old accounts back to him? A. I did.

Q. And he assigned new accounts to you? A. Yes.

William H. Burden—Cross.

229

By the Referee:

Q. Was that done both times, after the first transaction and also after the second transaction?

Mr. Houghton.—There was only one transaction of re-assigning accounts.

A. Only one re-assignment to him, January 13.

By Mr. Houghton:

Q. How many transactions of assigning accounts to you? A. There was three dates of it.

230

By the Referee:

Q. It was only on the third occasion you re-assigned accounts you then held? A. Yes.

By Mr. Houghton:

Q. What was the amount of the accounts assigned on January 5 to you? A. \$6776.31. The amount advanced at that time was \$5,000.

Q. That is in the two checks you have already testified to? A. Yes, sir.

231

Q. Did any other money pass on the January 13 to Mr. Canfield except the \$5,628.60? That is the only one of January 13, is it not? A. That was the only check passed at that time, the only money passed.

Q. Or check? A. Yes, sir.

It is hereby stipulated that the petition in bankruptcy in this case was filed on the 18th day of January, 1911, subject to correction.

Q. On this accounting on January 13, was there any provision made for your six per cent. interest or the extra one per cent? A. There was.

Q. In what way was that? A. It was included in the check for \$5628.

Q. How much was the interest and the one per cent? A. The interest was \$38.44 and the one per cent. was \$76.89.

Q. What had you done to cover that \$76.? A. I had gone over his shipping receipts, his evidence of shipping of the goods from factories.

233 Q. Did you go over his books? A. Only partially; I didn't go over his books entirely.

Q. What do you mean by that partially; did you go over them at all to acquaint yourself with the accounts? A. I accepted the accounts as he submitted them to me.

Q. You only went over then the accounts that he submitted to you? A. That's all.

Q. These accounts that were assigned? A. Yes, sir.

Q. And that's all you did? A. Yes, sir. That is not all I did. I went over his shipping receipts.

234 Q. What do you mean by going over shipping receipts? A. Examined them.

Q. The same shipping receipts that these accounts related to? A. Yes, sir.

Q. And that was on January 13? A. Yes, sir.

Q. Did you do that on January 5? A. Yes, sir.

Q. In reference to the accounts that were assigned on that day? A. Yes, sir.

Q. Did you have any talk with him about his business on the 13th as to why these accounts had not been paid? A. 13th of January?

Q. On the 5th of January? A. I did.

Q. What did he say? A. He spoke of slow collections the first of the year.

Q. Did you have any talk with him on the 13th, a further talk? A. No, sir. You have reference now to the December 16 assignment?

Q. To his business in general? A. No, sir, not on January 13.

Q. Didn't say anything about it at all? A. No, sir not about his business in general.

Q. Did you ask him if he wanted any more money? A. No sir.

Q. Did you say anything at all in reference to the maturing of the accounts being in April? A. I don't remember that I did. It was satisfactory to me. 236

Q. What is the actual amount that you claim that he owed you on January 18? A. I would have to figure it. Something under \$10,000.

Subscribed to before me this}
day of 1911.}

Referee in Bankruptcy.

Hearing adjourned to February 21, 1911, at 2 237
P. M.

238

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy.

In the Matter

*of*A. L. CANFIELD & COMPANY,
Bankrupt.

Before:

William H.
Willis, Esq.,
Referee in
Bankruptcy,
80 Wall
Street.

239

NEW YORK, FEBRUARY 21, 1911, 2 P. M.

HEARING ON RECLAMATION PROCEEDING
OF WILLIAM H. BURDEN.

NO APPEARANCES:

Hearing adjourned to February 24, 1911, 11.30
A. M.

240

UNITED STATES DISTRICT COURT

241

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy.

In the Matter

*of*ABRAM L. CANFIELD,
Bankrupt.

Before:
 William H.
 Willis, Esq.,
 Referee in
 Bankruptcy,
 80 Wall
 Street.

242

NEW YORK, FEBRUARY 24, 1911, 11:30 A. M.

HEARING ON RECLAMATION PROCEEDING
 OF WILLIAM H. BURDEN.

Proceeded pursuant to adjournment.

APPEARANCES:

MR. C. S. HOUGHTON, Receiver.

MESSRS. ENGEL BROS., Attorneys for Receiver, 243
 represented by

MR. ADOLPH ENGEL, Of Counsel.

MR. JOHN J. CRAWFORD, Attorney for Claimant.

MR. WILLIAM H. BURDEN, Claimant.

MR. S. J. ROSENBLUM, Attorney for Bankrupt.

244

William H. Burden—Re-direct.

WILLIAM H. BURDEN, re-called, testified as follows:

Re-direct examination by Mr. Engel:

Q. You testified at the last hearing that you examined some of the books of Mr. Canfield, is that correct? A. I only partially examined the books I said.

Q. What do you mean by partially? A. I examined—I didn't make a complete examination of the books.

245

Q. Well, can you give us any idea to what extent you made an examination of the books? A. I only gave them a slight examination, I would not call——

Mr. Crawford.—State what you did, Mr. Burden, just what you did.

A. I examined the vouchers and shipping receipts, vouchers for delivered goods, shipment of the goods.

Q. And do you want the Court to understand that vouchers are books? A. They are not books.

246

Q. Didn't you testify that you examined the books of Mr. Canfield? A. Only partially I said.

Q. What books did you examine, if any? A. The ledger; I don't claim I made an examination of it; what I did was to casually look at the books; that wasn't the time to examine the books.

Q. Can you describe Mr. Canfield's books in any way? A. I saw only his ledger and some of the original entries, the books of original entry.

Q. That is the only book you saw and examined, the ledger, is that correct? A. I don't claim at that time I examined the books, it was a very partial——

William H. Burden—Re-direct.

247

The Referee.—What did you do?

The Witness.—Examined the vouchers,
Your Honor.

Mr. Crawford.—So far as the books are
concerned state what you did with respect
to those books?

A. I don't claim I made an examination of the
books.

The Referee.—The question is what you
did, not what you say; what did you do?

248

A. I never examined the books except partially;
I don't claim I examined the books.

The Referee.—It isn't a question of what
you claim; what examination did you make
of the books.

Mr. Crawford.—Did you see any of the
entries?

A. I did.

Q. You say you examined the books partially;
what do you mean by that now? A. To see that
the accounts submitted to me agreed with the en-
tries on the books.

249

Q. So that all you did was to take the accounts
as you got them from Canfield and compare them
with the books, as you found them in the ledger?

A. Yes, sir.

Q. Did you examine the books at any time af-
ter that? A. No sir.

Subscribed to before me this}
day of 1911. }

250

Abram L. Canfield—Direct.

MR. ABRAM L. CANFIELD, bankrupt, called as a witness on behalf of the Receiver, being first duly sworn by the Referee, testified as follows:

Direct examination by Mr. Engel:

Q. Mr. Canfield, you are the bankrupt in this proceeding? A. I am.

Q. Do you know the claimant here, Mr. Burden? A. Yes, I know Mr. Burden.

251 Q. How did you make his acquaintance; under what circumstances? A. Mr. Burden was introduced to me by Mr. Koehler; Mr. Koehler is a broker, a money broker, 32 Broadway.

Q. Well, did Mr. Burden call on you at your place of business? A. Mr. Burden called upon me at my place of business with an introduction by Mr. Koehler.

Q. Did you have any conversation with him the first time he called on you with reference to the object or purpose of his call? A. Well, the purpose of his call—

The Referee.—Answer the question.

252 Q. Give us the conversation; did you have a conversation with him? A. I did.

Q. Will you state the conversation? A. Well, the purpose of—

Q. No, please, Mr. Canfield, tell us what Mr. Burden said and what you said and what anybody else said who was present at the meeting? A. I don't suppose I can repeat the exact words.

Q. In substance? A. That is, what I can give you; Mr. Burden's conversation was to seek entry into our business as a partner. He came there with that purpose through the introduction of

Mr. Koehler; it was to put money into the business, \$10,000, and so the conversation on his first call related to his becoming a partner in our business.

Q. Well, what happened after that; did Mr. Burden become a partner? A. He didn't become a partner.

Q. Did you then ask him to loan you \$10,000 or any sum of money? A. Mr. Burden's first talk was to become a partner into the business, to loan us \$10,000, or put \$10,000 into the business and to derive an income of \$250 per month for that interest, that \$10,000. He figured, and his proposition at that time was, that he was entitled to a 6 per cent. interest charge per year, and he talked about a 2 per cent. a month extra.

254

Q. Yes? A. Now, he talked about working an hour or two a day and thought that that might suit him. He asked at that particular time for a statement of our business which was handed to him.

Q. Was this all on the first meeting? A. This was the first conversation, I believe, that is what you are asking me.

Q. Yes? A. And the first call of Mr. Burden on us.

255

Q. Well, now, what happened after that; did Mr. Burden again call a few days after that? A. He went away and said he would come again, which he did a few days later.

Q. Did you have a conversation when he again called? A. I did.

Q. State the conversation, please? A. I said that we would not pay as much bonus as Mr. Burden asked for which was, understand, 6 per cent and 2 per cent. per month. We could not afford

256

Abram L. Canfield—Direct.

to pay as much as that for the money to be put into the business and Mr. Burden said also that he would not—he would withdraw his proposition relative to doing any work there; there was no work really that he could do, so the first proposition fell through. Now, another proposition was submitted by Mr. Burden in which he would simply loan us the money and take as security assigned accounts, and loan us \$10,000.

Q. Now, what was the conversation with respect to the loan of \$10,000?

257

Mr. Crawford.—I object to this on the ground that the negotiations of the parties are merged in the written instrument.

The Referee.—Overruled.

Mr. Crawford.—An exception.

Q. State the conversation? A. Why, then the proposition was put up to me by Mr. Burden that he loan \$10,000 and first asked for 2 per cent bonus. We said we could not afford to pay it, and then he agreed to loan us \$10,000—

258

Mr. Crawford.—I move to strike out what he agreed to do.

The Referee.—State what he said, in substance?

A. He said he would loan us \$10,000 on this basis; 6 per cent legal interest and 1 per cent per month, making in all 18 per cent.

Q. Did Mr. Burden use the words bonus of 1 per cent a month at the time you had this conversation? A. Yes.

Q. Did he say to you I want 6 per cent legal interest in addition to 1 per cent bonus every month for making this loan? A. Yes.

Abram L. Canfield—Direct.

259

Q. That was the language he used? A. Yes sir.

Q. What did you tell him then? A. Well, I said that we needed the money in our business and I agreed—

Q. What you said; did you tell him you would take that loan? A. Yes, and I took the loan.

Q. Didn't you at that time tell him that you would not like to pay that much bonus but that you were hard-pressed for money and could not help yourself?

Mr. Crawford.—Objected to as leading.

260

Q. What else did you say to him at that time?

A. That we needed the money; that is why we paid or agreed to pay this matter of bonus, 1 per cent per month.

Q. Was there anything said about being hard pressed for money? A. I said that we needed the money.

Q. But the words hard pressed weren't used? A. I can't recall that part.

Q. If I understand you correctly, before you—

Mr. Crawford.—I object to that form of questioning the witness.

261

The Referee.—Overruled.

Mr. Crawford.—An exception.

Q. If I understood you before you said Mr. Burden at first asked for 2 per cent bonus per month? A. Yes sir.

Q. And at the second meeting it was finally arranged you pay 1 per cent to which both of you agreed? A. Yes, sir.

Q. Who is Mrs. Herzog? A. My Secretary.

Q. Was she present at any of these meetings? A. Present at all of them.

262

Abram L. Canfield—Direct.

Q. She occupied the same room, the same desk?
A. Her desk adjoins mine.

Q. And all of these conversations and this agreement with respect to this loan were had within the State of New York? A. In the City of New York.

Q. 97 Beekman St? A. 97 Beekman St.

Q. Now, you did assign, by reason of that agreement certain accounts to Mr. Burden? A. I did.

263

Q. Among your—among those accounts was a claim in your favor against the United States Government, is that right? A. Yes.

Q. The Isthmian Canal Commission? A. Yes, sir.

Q. In the sum of \$2251.70, is that correct? A. Yes.

Q. This contract with the Government at the time of your assignment to Mr. Burden wasn't completed, was it? A. No, it was not.

Q. The United States Government had not at the time of the assignment issued a warrant? A. No.

264

Q. From the Treasury Department? A. No.

Q. Was that contract covering the assignment filed with the United States Government? A. No.

Q. I notice that the agreement in evidence which I show you bears the signature of two witnesses? (Paper shown witness.) A. Yes, Hess & Koehler.

Q. You will notice the agreement says S. Hess, Abram L. Canfield, Arthur J. Koehler, for William H. Burden. Was Mr. Hess and Mr. Koehler present at the time this contract was signed; were they both present at the same time? A. They were both present at the same time.

Abram L. Canfield—Direct.

265

Q. They were both present? A. Yes.

Q. After this agreement for the loan of this money was consummated did Mr. Burden tell you he would call on his lawyer and bring back the written agreement? A. Yes.

Q. Is that agreement, Exhibit 1, which I show you, the paper brought to you? A. Yes.

Q. Did you read that agreement? A. Well, I have only glanced it over.

Q. Well, glance it over; did you notice in that agreement something pertaining to services to be rendered on the part of Mr. Burden?

266

Mr. Crawford.—Objected to, what he knows is immaterial; there is the contract and it speaks for itself.

The Referee.—Overruled.

Mr. Crawford.—An exception.

A. Yes, at the time the agreement was—

Q. Did you notice it? A. Yes, at the time the agreement was—

Q. Did you notice it? A. Yes.

Q. Well, now, when you noticed that did you say to Mr. Burden—

267

The Referee.—Does he notice it now or, at that time; ask that

Q. At the time this agreement was brought to you I refer to? A. Yes, sir.

Q. And you looked at the agreement and you noticed the clause about services to be rendered? A. Yes, sir.

Q. What did you say to Mr. Burden? A. Just what?

268

Abram L. Canfield—Cross.

Mr. Crawford.—The same objection.*The Referee.*—Overruled.*Mr. Crawford.*—Exception.

A. I asked Mr. Burden just what he meant by that clause; why, he said that that was simply to get around the usury law; there were no services to be rendered at all; there were no services rendered.

269

Mr. Crawford.—I move to strike out no services rendered.*Mr. Engel.*—I consent.

Q. Did Mr. Burden render any services to you of any kind? A. No, sir.

Q. Did Mr. Burden ever examine your books? A. Not to my knowledge, no.

Q. Except at the time you gave Mr. Burden the assignment of the accounts and Mr. Burden examined your shipping receipts to ascertain whether you had shipped the goods, did he afterwards examine any shipping receipts or any books of yours? A. No, he never did.

270

Q. Did he ever render any other services to you of any kind? A. No, sir.

Cross examination by Mr. Crawford:

Q. You said you said to Mr. Burden you were hard pressed for money? A. I haven't used the words hard-pressed.

Q. What did you say to him about your necessities? A. That we needed the money and could use it.

Q. Did you tell him you were pressed for money? A. To the best of my knowledge I don't think the word pressed was used.

Abram L. Canfield—Cross.

271

Q. Well, you have already testified to that, haven't you?

The Referee.—He refused to testify about that.

Q. Did you say—? A. I have stated that I do not think the word hard-pressed was used at all; that we needed money; could use the money.

Q. Did you say you needed the money? A. Yes, sir.

Q. Is that your signature, Mr. Canfield (showing witness paper)? A. Yes, sir.

272

Q. That is the statement of the condition of your business that you delivered to Mr. Burden, is it not? A. It looks so to me, yes, sir.

Q. You delivered that to Mr. Burden at the same time or prior to the time that this contract was made? A. Yes.

Q. You did? A. Yes.

Mr. Crawford.—I offer the statement in evidence.

Mr. Engel.—Objected to as incompetent.

The Referee.—Overruled.

Mr. Engel.—An exception.

273

(Paper Marked in Evidence Claimant's Exhibit No. 1, February 24, 1911.)

Q. How many conversations did you have with Mr. Burden all together? A. I don't think I can remember that, sir.

Q. Well, how many can you remember? A. Half a dozen at least.

Q. Covering what period of time? A. From the time that I was introduced to Mr. Burden up to the present time.

274

Abram L. Canfield—Re-direct.

Q. Where were those conversations held? A. At 97 Beekman Street.

Q. You say Mr. Burden's first proposition was that he should become a partner in your business?

A. Yes, sir.

Q. And he was to contribute capital? A. Yes, sir.

Q. When was that proposition made? A. I can't give you the date—the first interview, yes, sir.

275 Q. And who was present at the time? A. My Secretary was present.

Q. Anybody else? A. There were other people in the office but they were not—they were helping around the business somewhere.

Re-direct examination by Mr. Engel:

Q. When you said no one else was present—you testified before Mrs. Herzog was present, did you not? A. Mrs. Herzog is present at all contracts—arrangements made by me; her desk is next to mine and she is supposed to be familiar with all such things.

276

Subscribed to before me this }
day of , 1911. }

REFEREE IN BANKRUPTCY.

Sadie Herzog—Direct.

277

SADIE HERZOG, called as a witness on behalf of the Receiver, being first duly sworn by the Referee; testified as follows:

Direct examination by Mr. Engel:

Q. Have you been in the employ of Mr. Canfield? A. Yes, sir.

Q. How long? A. 15 years.

Q. Up until what time? A. Oh, till—.

Q. The filing of the petition in bankruptcy?

A. Yes, sir.

Q. Did you recall transactions had between Mr. Canfield and Mr. Burden with reference to a loan of money or an advance of money? A. Yes. 278

Q. Do you recall the first visit of Mr. Burden on Mr. Canfield? Do you recall a visit that Mr. Burden made to Mr. Canfield? A. Yes.

Q. Did you hear Mr. Burden having a conversation with Mr. Canfield? A. Well, I remember some conversation

Q. By the way, can you give us the date of that conversation or, as near as you can remember? A. No, I can't give the date.

Q. You recall about the time of the bankruptcy, don't you? A. Yes. 279

Q. Was it month before the bankruptcy, or two months before or six weeks? A. Why, I guess about 2 or 2½ months before; I don't know the exact time.

Q. Will you give us the conversation that you heard?

Mr. Crawford.—Objected to on the ground that the arrangements of the parties are all merged in a written statement.

The Referee.—Overruled.

280

Sadie Herzog—Direct.

Mr. Crawford.—An exception.

A. Well, Mr. Burden said to Mr. Canfield that he would like to become a partner in his business and he would loan him \$10,000, and for this loan he wanted 6 per cent and 2 per cent. besides; then Mr. Burden asked Mr. Canfield for a statement which was given to him.

Q. And what did Mr. Burden say? A. Then Mr. Burden said, as far as I can recall; he said he'd look the matter over and come back in the course of a few days and advise Mr. Canfield.

281

Q. Did Mr. Burden come back a few days subsequent? A. I think he came back in two or three days; I don't know; in about two or three days he came back.

Q. What conversation did you hear then? A. Well, he suggested another proposition to Mr. Canfield and Mr. Canfield would not accept that first one, but he suggested another proposition to Mr. Canfield.

282

Q. What did you hear? A. Then I heard Mr. Burden say to Mr. Canfield that he would agree to allow him \$10,000 on assigned accounts and for this loan he would agree to give him 6 per cent—Mr. Burden said this—6 per cent and 1 per cent as a bonus, which was to cover the—

Q. Just give us the conversation?

Mr. Crawford.—She is giving the conversation.

A. That was the 1 per cent bonus.

Mr. Crawford.—Which was what, go on from where you were interrupted; which was to cover—

Sadie Herzog—Direct.

283

A. To cover the bonus and usury charge.

Mr. Crawford.—I move to strike out usury charge; you didn't hear the word usury used did you?

A. Yes, I heard it; it was to cover the usury charge.

Q. You heard them use that word? A. I certainly did, yes. Then Mr. Canfield told Mr. Burden he didn't have any use for him in the office to do any work; we had no work for Mr. Burden in the office, and then—

284

Q. Are you referring to the conversation when Mr. Burden brought the agreement to Mr. Canfield? A. Well, this was the second time.

Q. Well, after the second time that you call it, did Mr. Burden call with an agreement?

Mr. Crawford.—Don't lead the witness.

A. I don't remember now.

Q. I show you this paper and I ask you if you ever saw that before? A. Yes, I saw that.

Q. Do you recall Mr. Burden bringing this paper to Mr. Canfield? A. Yes.

285

Q. Isn't that the time you refer to as to the conversation concerning the usury charge or bonus?

Mr. Crawford.—Objected to as leading.
The Referee.—Overruled.

Mr. Crawford.—An exception.

Q. Answer the question? A. I think it was.

Q. Isn't it a fact that Mr. Canfield asked Mr. Burden what was meant in this agreement con-

286

Sadie Herzog—Direct.

cerning services and charges for services to be rendered by Mr. Burden?

Mr. Crawford.—Objected to as leading.
The Referee.—Sustained.

Q. What did you hear Mr. Canfield say concerning this agreement shown you? A. I don't remember.

287 Q. Well, did Mr. Canfield say anything about services or did Mr. Burden say anything about services to be rendered? A. Well, Mr. Burden said he would like to have about an hour's work to do in our establishment every day, and then Mr. Canfield told him we would not have any use for him there.

Q. Did Mr. Burden, as far as your knowledge goes, render any services to Mr. Canfield? A. No, he did not.

Q. Did Mr. Burden ever examine the books of Mr. Canfield? A. No, he did not.

288 Q. With the exception of the time that these assignments of accounts were made by Mr. Canfield to Mr. Burden, did Mr. Burden ever examine any shipping receipts in Mr. Canfield's place of business? A. Yes.

Q. When? A. At the time the statements were made up he wanted to see the shipping receipts covering all these different items on the statements and they were shown to him.

Q. That was at the time that these accounts were made up? A. At the time that those accounts were made up.

Q. Did Mr. Burden ever again after that examine any shipping receipts? A. No, he did not.

Cross examination by Mr. Crawford:

Q. Did he examine any of the shipping receipts on or about the 16th of December, 1910? A. The only time he ever examined any shipping receipts was when the statements were made up; I don't remember any dates.

Q. There were three different statements? A. Yes, sir, and at that time that the statements were made up he examined the receipts on each of those three occasions? A. Yes, I don't know whether 1910—.

Q. There were three separate occasions on which he examined the shipping receipts and compared them with the bills as you made them out? A. Yes, sir.

Q. Did he look at the ledger? A. No, he never looked at my ledgers; never asked to see my ledgers; he said to me the other day on the street—.

Q. Never mind what he did on those occasions? A. No, he never went through my ledgers.

Q. Didn't he ever look at any entries on the ledger? A. No, never on my ledgers, never.

Q. Where was the, describe the situation of the rooms at Mr. Canfield's place? A. Well, Mr. Canfield had a private office and I had a desk; one desk was directly in back of his, then I had another desk that was on the side.

Q. How far from Mr. Canfield's? A. Oh, about ten feet.

Q. Did you keep the books? A. Not all the time.

Q. There was another bookkeeper there? A. Yes.

Q. How much bookkeeping did you do? A. I took charge of the books after our bookkeeper left; and I was asked to take charge of the books the best I could.

Q. When did the bookkeeper leave? A. Well, I guess about a year ago; something around a year ago.

Q. And you had charge of the books all last fall? A. Yes, sir.

Q. Anybody else do any work on those books? A. Yes, I had an assistant.

Q. Didn't you have a bookkeeper's desk? A. I used the bookkeeper's desk sometimes, not always.

Q. Was not there a bookkeeper's desk in the place? A. Oh, yes.

293 Q. Where those books were kept? A. The books were kept in the safe.

Q. I mean during the day? A. They were kept on the desk.

Q. How far was that from Mr. Canfield's desk? A. That is about the same distance, well, a little further than my desk was away from his.

Q. About 10 feet? A. Yes, 10 or 12 feet.

Q. When Mr. Burden was there was the door of Mr. Canfield's office closed? A. The side door was and the front door was half open and half closed.

294 Q. And where were you at the time? A. At my shipping desk.

Q. You weren't in the room with them? A. No, I was at the shipping desk with the windows open.

Q. How far away was that? A. Directly in back of Mr. Canfield's desk there is a partition, a small partition and the windows were open, they are always open.

Q. Now, what do you mean by the windows closed and a partition between? A. The lower part is wooden and the other part is half; these windows are always open.

Q. Then, was your desk in the same room with Mr. Canfield's? A. No.

Q. It is on the other side of the partition? A. The other side.

Q. And he has a private room in which he has a desk for himself? A. Yes.

Q. And that was the situation last October? A. Yes.

Q. Last December? A. Yes.

Q. So that at the time that you say you overheard these conversations between Mr. Burden and Mr. Canfield you weren't actually in the room? A. No, I wasn't in the room.

Q. You were on the other side of the partition? 296
A. On the other side.

Q. Mr. Burden did talk with Mr. Canfield about having worked at Mr. Canfield's place? A. Yes, he certainly did.

Q. What he said he wanted to do was to have employment there, didn't he? A. Yes.

Q. And he wanted actually to do some work there, didn't he? A. Yes.

Re-direct examination by Mr. Engel:

Q. This partition you speak about, how thick was this? A. Oh, you could hear anybody, could hear anything. 297

Q. How thick was it about half an inch? A. An inch, half an inch, an inch.

Q. And your desk was close with the partition? A. Right up with the partition exactly.

Q. And Mr. Canfield's desk was close to the partition on the inside? A. Yes, sir.

Q. Practically set back to back? A. Yes, sir, back to back.

Q. And the windows were open? A. Yes.

Q. And you heard the conversation clearly? A. Yes, you can hear all that is said there.

298

Sadie Herzog—Re-direct.

Q. You said before you were with Mr. Canfield's business 15 years ago? A. Yes, sir.

Q. You were interested in his business, in what was going on? A. Always, when any contracts were made.

Q. You say you met Mr. Burden the other day? A. Yes.

Q. Did you have a conversation with him? A. Yes.

Q. What was the conversation? A. Mr. Burden asked on the street, said it was too bad he didn't look over our ledgers because the bonding company said it was a necessary thing. He met me at 84 William Street and he walked up the Street with me and said it was too bad he didn't look over our ledgers.

Q. His statement was that the Bonding Company required that he should do that work? A. Yes, he said the Bonding Company required that he should look over our ledgers.

Q. And he regretted that he hadn't done that? A. Yes.

300

Subscribed to before me this
day of , 1911.

REFEREE IN BANKRUPTCY.

Mr. Crawford.—I would like to ask Mr. Canfield one or two more questions.

Abram L. Canfield—Cross.

301

ABRAM L. CANFIELD, recalled, testified as follows:

Cross examination by Mr. Crawford:

Q. When you delivered to Mr. Burden this statement in which you included \$33,552.13 as your liabilities you knew that you had outstanding indebtedness besides that, didn't you? A. I certainly would object to answering that question.

Q. On what ground? A. It has no bearing upon this matter.

Q. Is that your only ground that it has no bearing? A. It might incriminate me, believe is the way to—

Q. You put your refusal to state that upon the ground that the answer to my question might incriminate you; is that your objection?

Mr. Canfield.—(Addressing the Referee). I want to consult with my attorney first on that?

The Referee.—I will allow you to do that.
(Witness retires to an adjoining room with his counsel and returns.)

A. On the advice of counsel I will refuse to answer that question on the ground that it might incriminate me.

Mr. Crawford.—Will your Honor direct the witness to answer.

The Referee.—I decline to so direct.

Q. At that time you had outstanding other liabilities beyond the \$33,552.13? A. I refuse to answer on the same grounds as previously stated.

304

Mr. Crawford.—I offer in evidence the Bond referred to in the contract and which has been mentioned here by the witnesses.

(Bond Marked Claimant's Exhibit in Evidence No. 2, February 24, 1911.)

Subscribed to before me this)
day of , 1911.)

REFeree IN BANKRUPTCY.

Hearing adjourned to March 2nd, 1911, at 11:30
A. M.

305

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UNITED STATES DISTRICT COURT,

307

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy.

IN THE MATTER

*of*ABRAM L. CANFIELD,
Bankrupt.

Before:
 William H.
 Willis, Esq.,
 Referee in
 Bankruptcy,
 80 Wall
 Street.

308

New York, March 2, 1911, 11:30 A. M.

HEARING ON RECLAMATION PROCEEDING OF
 WILLIAM H. BURDEN.

Proceeded pursuant to adjournment.

APPEARANCES:

MR. C. S. HOUGHTON, Receiver.

MESSRS. ENGEL BROS., Attorneys for Receiver,
 represented by

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MR. ADOLPH ENGEL, Of Counsel.

MR. JOHN J. CRAWFORD, Attorney for Claimant.

MR. WILLIAM H. BURDEN, Claimant.

310

Arthur J. Koehler—Direct.

ARTHUR J. KOEHLER, witness, called on behalf of the claimant and being first duly sworn by the Referee, testified as follows:

Direct examination by Mr. Crawford:

Q. Mr. Koehler, I show you Claimant's Exhibit A, and ask you if you are the A. J. Koehler who has been referred to as the broker that negotiated this transaction between Mr. Burden and Mr. Canfield? A. I am.

311 Q. When did you first meet Mr. Burden? A. I think it was some time in April, 1910.

Q. How did you happen to meet him? A. I saw an advertisement of his in the Herald and I answered it.

Q. Is that the one you answered? A. Yes.

Mr. Crawford.—I ask that that be marked for Identification.

(Paper Marked for Identification Claimant's Exhibit No. 1, March 2, 1911.)

Q. After you saw Mr. Burden did you have a talk with Mr. Canfield? A. I did.

312 Q. What was said? A. I told Mr. Canfield I had a client who would lend him \$10,000 upon security provided he would get a position in his business which would bring him a weekly salary of \$50 a week, and Mr. Canfield said he could use a good man, and I arranged for a conference.

Q. Now, was anything said as to the nature of the duties that Mr. Burden could or would perform? A. Yes, Mr. Burden was to have work in the office, looking after the accounts and the credits and work pertaining to that particular line.

Q. Well, then, go on with your statement from that point; what more was said? A. Nothing much more at that time.

Arthur J. Koehler—Direct.

313

Q. Well, did Mr. Canfield say that he would accept the proposition? A. Well, he wanted to see the man first.

Q. Then, what did he say? A. I was to send him down and introduce him.

Q. How did the matter happen to go off? A. Mr. Burden—

The Referee.—What do you mean?

Q. Then, nothing came of that negotiation? A. Why, I did introduce Mr. Burden.

Q. At that time nothing came of it? A. No.

314

Q. Those negotiations weren't consummated? A. No, not at that time.

Q. How did it happen that it was not consummated? A. Mr. Burden wanted a later financial statement; the financial statement that I gave him.

The Referee.—Are you talking about this interview?

Mr. Crawford.—No, in his statement he said he went there with Mr. Burden; that wasn't consummated; now, I am asking him why it happened that it was not consummated.

315

A. Mr. Burden wanted a new financial statement, the financial statement that I showed him was about a year—he wanted a later one; if he got that later one and it was satisfactory he was willing to conclude negotiations.

Q. Was that statement rendered at that time? A. It was not.

Q. The matter then, was taken up subsequently? A. It was.

316

Arthur J. Koehler—Direct.

Q. Did you tell Mr. Burden anything about a bond which the Fidelity & Casualty Company was issuing? A. I did.

Q. Then, further negotiations were taken up with Mr. Canfield upon the basis of his giving the—giving one of these bonds? A. Yes, sir, a bond from the Fidelity & Casualty Company.

Q. And of his rendering a statement as of a more recent date? A. Yes.

The Receiver.—Let the witness tell.

The Referee.—Yes.

317

Mr. Crawford.—All right.

Q. Is the signature of Arthur J. Koehler on Claimant's Exhibit A, your signature? A. Yes.

Q. When was that made? A. On the 16th of December, 1910.

Q. Were you present at the time Mr. Burden and Mr. Canfield—where was the paper signed? A. In Mr. Canfield's office.

Q. Was it in a private office? A. Yes, his private office.

Q. Please state what took place at that time? A. I came in the office and found Mr. Burden sitting in the private office of Mr. Canfield. Mr. Canfield at that moment was on the floor somewhere attending to some business and Mr. Burden and I waited for him to come in. When he did come in Mr. Burden pulled out the contracts, there were three of them, I think, and gave one to Mr. Canfield and one to me to look over.

318

The Referee.—In triplicate?

The Witness.—Yes, sir.

The Referee.—Three contracts?

Mr. Crawford.—No, three copies of the same.

Arthur J. Koehler—Direct.

319

A. (Continued.) Mr. Canfield read his over, I read mine and Mr. Burden held one. After reading over the contract Mr. Canfield said "I guess this is all right," and started to sign them. After he signed them I witnessed them as per Mr. Burden's signature, and Mr. Canfield called in his bookkeeper, Miss Hess and she signed the others as witness for him.

Q. Where was Miss Hess at the time that she was called in? A. She was in the outside office.

Q. At any particular desk? A. I don't know whether she was at any particular desk; I think she was at the bookkeeper's desk. 320

Q. How far was that away from Mr. Canfield's private office? A. Oh, about 12 to 15 feet.

Q. Did Mr. Canfield ask of Mr. Burden what the purpose of the stipulation in this contract was with respect to services?

Mr. Engel.—Objected to as leading; ask for the conversation that took place at that time.

The Referee.—Anything said about—

Mr. Crawford.—I will ask the question.

321

Q. Was anything said at that time about—respecting the stipulation in the contract for compensation to be paid for services to be performed?

A. There was not.

Q. Was anything said about a bonus? A. There was not.

Q. Was the subject of usury mentioned? A. No.

Q. Was the word usury used? A. No.

Q. Was the words "usury charge" used? A. No.

322

Arthur J. Koehler—Cross.

Q. In any conversation that you had with Mr. Canfield was the subject of Mr. Burden becoming a partner mentioned? A. No.

Cross examination by Mr. Engel:

Q. Mr. Koehler, do you know Mr. Crawford, here, counsel for Mr. Burden? A. I never met him until recently.

Q. How recently did you meet him? A. Yesterday.

323 Q. Where? A. At my office.

Q. Did you have a conversation with him? A. I did.

Q. You were the broker for Mr. Burden or Mr. Canfield? A. For both.

Q. Did you receive any compensation for your services? A. I did.

Q. From whom? A. Mr. Canfield.

Q. Never from Mr. Burden? A. No.

Q. Now, what was the proposition that you told Mr. Burden about the loan of this money? When? A. The first time?

324 Q. That you spoke to him about it? A. Mr. Burden told me that he would lend a certain amount of money, from \$10,000 to \$20,000, in some good business upon certain terms, and those were that he would invest from \$20,000 to \$30,000—from 10 to 20 thousand dollars in a business provided he receive a position there that would pay him at least \$50 a week.

Q. Did you understand from Mr. Burden's conversation that he would not loan any money for a mere 6 per cent?

Mr. Crawford.—I object to that as calling for the understanding or conclusion of the witness and not for the facts.

Arthur J. Koehler—Cross.

325

The Referee.—Overruled.

Mr. Crawford.—Exception.

A. Well, I imagined he did want more inasmuch as he wanted \$50 a week salary.

Q. Do you believe now that the transaction as testified to by Mr. Burden was that he lend this \$10,000 to Mr. Canfield for the 6 per cent. legal interest?

Mr. Crawford.—Objected to.

The Referee.—Sustained.

326

Q. Now, you said before you understood Mr. Burden was to loan this money only in the event that he get a position that would inure to him \$50 a week? A. Yes, sir, that was the original proposition.

Q. Do you know whether or not Mr. Burden got a position with Mr. Canfield at that salary?

Mr. Crawford.—Objected to as irrelevant and immaterial.

The Referee.—Overruled.

Mr. Crawford.—Exception.

327

A. Well, I don't think he did.

Q. But you know he loaned this money? A. I do.

Q. Do you want to change your opinion now as to the compensations, the reasons for Mr. Burden loaning this money; if you know?

Mr. Crawford.—Objected to.

Mr. Engel.—Question withdrawn.

Q. You say this paper Exhibit 1 for Identification is what attracted you to Mr. Burden? A. Yes, sir, I answered that advertisement.

328

Arthur J. Koehler—Cross.

Mr. Engel.—I offer the paper in evidence.*Mr. Crawford.*—No objection.

(Paper marked Receiver's Exhibit No. 1 in evidence, March 2, 1911.)

Q. You said, Mr. Koehler, that you subsequently found out that Mr. Burden did not obtain a position with Mr. Canfield? A. Yes, I so understood.

329 Q. Well, now, after you found that out, didn't you then have another conversation with Mr. Burden with respect to some other form of making this loan? A. Before the contract was signed?

Q. Yes? A. Yes.

Q. Will you give us that conversation, please?

A. Well, Mr.—

Mr. Crawford.—I object to any conversation that took place between this witness and Mr. Burden as incompetent, irrelevant and immaterial and not within the issues in this proceeding.

The Referee.—Overruled.

Mr. Crawford.—Exception.

330

A. Subsequently I met Mr. Burden and I discussed with him the question of arranging this matter, provided—

Q. Give us the conversation, please?

Mr. Crawford.—He is trying to give it.

A. I am trying to give it to you.

The Referee.—What you said to Mr. Burden?

A. I said to Mr. Burden that provided the new statement was satisfactory to him, would he make some arrangement with Mr. Canfield provided Mr. Canfield would give a surety bond and Mr. Burden told me that the Fidelity & Casualty Co. Bond provided for certain work and contingencies and it seemed to him a satisfactory way of concluding business with Mr. Canfield, and if the statement was satisfactory he would make some arrangement with him.

Q. Didn't you say before that you told Burden about this bond proposition? A. Yes.

332

Q. Well, didn't you say a few moments before that that Mr. Burden told you about the bond proposition? A. I did not.

Q. You are sure about that? A. Pretty sure.

Q. Now, you say that Miss Hess wasn't in the room? A. Not in the private office.

Q. When this paper was signed? A. Not in the private office.

Q. You say she was about 10 or 15 feet away; is that right? A. But, she was called in, yes.

Q. What date is that when you called on Mr. Burden when this contract in evidence was signed?

A. I think it was the 16th of December.

333

Q. That is what you said before? A. Yes, that is what I said before.

Q. How do you fix that date? A. Well, my impression dates back to that time; that day that it was closed.

Q. Now, but how do you fix the date, the 16th, as the date this paper was signed? A. Well, from the time I got my commission or part of it.

Q. Have you any record of that? A. (Looking through a memo. taken from the pocket of the witness) I think I have. It was December 17th,

when I received the payment from him, the following day.

Q. You say you received the payment on December 17th; that was the following day? A. Yes, sir, that is my impression.

Q. Just look at this paper and see if it isn't the 14th of December when this paper was signed?

A. That is right.

Q. Then you are mistaken when you said before it was the 16th? A. It looks that way.

335 Q. Now, isn't it a fact, Mr. Koehler, that you were not present when this paper was signed?

A. It certainly is not a fact; it is a fact I was there and the paper was signed, because my signature is there.

Q. Is it not a fact that you signed this at your office as a witness to Mr. Burden's signature?

A. It is not, no.

Q. Did you see Mr. Canfield sign the paper?

A. I did.

Q. Can you explain to the Court the reason for signing Arthur J. Koehler for William H. Burden? A. I signed for him and Miss Hess for Canfield.

336 Q. How long were you in the office of Mr. Canfield when this paper was signed? A. Oh, probably half an hour.

Q. And you said before that all that transpired that day was in effect, that Mr. Burden called with three papers, you held one and Mr. Burden held one and Mr. Canfield held one, that they glanced over this paper and Mr. Canfield called in Miss Hess and the paper was signed; is that correct? A. I simply testified to the time that I was there on that day. Mr. Canfield signed the papers and Mr. Burden signed the papers. I

witnessed Mr. Burden's signature and then Miss Hess was called in and witnessed Mr. Canfield's signature.

Q. But you now say you were there a half hour?

A. I mean during the whole time.

Q. That was a half hour? A. I think so.

Q. And all that was said or done was the reading of this paper composed of 4 pages and the signing of them, and that took half an hour? A. I don't say all that was said and done. In the first place we had to wait for Mr. Canfield to come in and then the papers were signed, and then we may have talked of other matters; I don't know; I don't say that was all that was talked about, but I mean as far as that particular contract is concerned.

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Q. (Repeated)? A. There was nothing spoken at all, except Mr. Canfield came in, read the paper and said it was all right.

The Referee.—Is that correct?

A. As far as I can remember.

Q. And that is as true as everything else you have testified to here? A. Whatever I have testified to is true.

339

Q. You say Miss Hess was the bookkeeper for Mr. Canfield? A. Yes.

Q. Don't you know that she was his private Secretary? A. I do not.

Q. Did you never discuss any business affairs with Mr. Canfield with Miss Hess? A. I did not.

Q. Did you never see her in his private office seated right next to him? A. No.

Q. Do you know how far Miss Hess's desk was from the desk of Mr. Canfield at that time? A. His private office?

Q. Yes? A. I figured it to be 12 or 15 feet.

Q. Are you now referring to the bookkeeper's desk or Miss Hess's? A. Well, either one were about that same distance; one is this way and one is that way.

By the Receiver:

Mr. Houghton.—Could I have the privilege of asking him a couple of questions?

The Referee.—I think so, yes.

Q. Mr. Koehler, you had had prior transactions with Mr. Canfield, had you not? A. I had, yes.

Q. In respect to obtaining loans? A. Yes.

Q. But you had never met Mr. Burden until you saw this advertisement in the paper? A. Correct.

Q. At the time you saw this advertisement in the paper you knew that Mr. Canfield was in the market for a loan, did you not? A. I did.

Q. He had already told you so? A. Yes.

Q. And had he told you why he wanted the loan? A. Why, yes.

Mr. Crawford.—I object to what Mr. Canfield said to Mr. Koehler before Mr. Koehler became acquainted with Mr. Burden.

The Referee.—I don't see the importance of it.

Mr. Crawford.—It does not seem to be relevant or material.

Mr. Engel.—Question withdrawn.

Q. Now, after you had seen this advertisement you called upon Mr. Burden? A. No, he called upon me. I wrote him.

Q. You wrote him to call upon you? A. Yes.

Q. Now, what was the first thing you said to him about Mr. Canfield? A. Well, I gave him—

Q. Say what you said as near as you can remember; as near as you can remember what did you say? A. Well, I had a half a dozen different concerns that I could use the money for, and I mentioned the names of them and Mr. Burden said to me that he did not want to lend his money to any Jewish concerns, only wanted to lend it to Christian concerns, and then I brought up Mr. Canfield's business.

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Q. What did you say to him about it? A. I told him I had been doing business with Mr. Canfield for some time, he had been in business for a great many years and bore a very excellent reputation and I thought it would be a good opportunity for him to make an arrangement with Mr. Canfield. I showed him the statement that I had on file in my office, and he looked it over and thought it was all right and said that he would like to take the matter up with Mr. Canfield upon a basis where he could get—

Q. Which you have testified to? A. Yes.

Q. Now, did you send him to Mr. Canfield? A. 345
I did.

Q. With one of your cards? A. I did, yes.

Q. But you were not present at that interview, were you? A. I wasn't.

Q. And so you, of course, do not know what took place at that time? A. I do not except generally.

Q. Now, then, after the interview, did Mr. Burden come to see you again? A. He did.

Q. What did he say? A. He said that he would be prepared to go on and do business with Mr.

Canfield, provided he gave him, got him up a statement.

Q. Did he say anything about getting a position there? A. Yes.

Q. What did he say? A. He wanted a position there and he wanted to receive a salary of \$50 a week.

Q. So that that was the second time he said he wanted a position there and wanted \$50 a week? A. Oh, yes, it was his idea all the time.

347 Q. Now, then, did you again send him to Mr. Canfield? A. No, not for some time after that.

Q. How long afterwards was it? A. Oh, it might have been 5 or 6 weeks.

Q. Had you seen Canfield in the mean time? A. Oh, yes.

Q. And Burden in the meantime? A. Yes.

Q. And had you had any conversation with him about the loan? A. To Mr. Burden?

Q. Yes? A. Yes, I seen him about some other concerns.

Q. You did? A. Yes.

Q. And did he tell you why he didn't take up the first proposition? A. Yes.

348 Q. What did he say? A. He wanted to have another statement and as soon as he got that other statement and it was satisfactory he would go ahead with Mr. Canfield.

Q. So that during the 5 weeks interim no statement was given, as far as you know? A. Yes, there was none given.

Q. Now, after the conversation about the statement did you send him again to Mr. Canfield? A. I did.

Q. And what was the conversation leading up to his going to Mr. Canfield, after 5 weeks? A.

The conversation between Mr. Burden and myself?

Mr. Crawford.—I object to that, your associate has gone over that fully.

A. Well, Mr. Burden had been to the Fidelity Company and seen the bond and he said under that, this bond, he thought probably some arrangement could be made with Mr. Canfield provided he was willing to pay him so much for his services—one per cent per month on the money he advanced.

350

Q. How much? A. 1 per cent per month on the money he advanced.

Q. Did you go with him to see Mr. Canfield? A. I don't think I did.

Q. Do you know whether he did go and see Mr. Canfield? A. He said so.

Q. But you don't know what that conversation was? A. No.

Q. Now, after he had been to see Mr. Canfield did you again see Mr. Burden? A. I think so.

Q. Can you tell us about what date this was, or how long prior to the signing of the contracts? A. Some time towards the end of November.

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Q. Did you see Mr. Burden after he had called upon Mr. Canfield? A. I think I did.

Q. And what did he say? A. He said that—well, this is one of the times anyhow; he said he thought he and Mr. Canfield would get together.

Q. Was anything said that you remember? A. Why, no, I can't remember anything special.

Q. Was there any further conversation as to the 1 per cent? A. No, we had talked about that before and I had discussed the terms with Mr. Canfield and Mr. Canfield was satisfied and Mr. Burden seemed to be satisfied.

Q. Well, tell me what the discussion was about, the 1 per cent; this is the first time we have heard you talked with Mr. Canfield about the 1 per cent?

A. I told Mr. Canfield what the terms were going to be, of course.

Q. What did you say? A. I told him Mr. Burden wanted 1 per cent a month to cover his services in the matter as provided in the Fidelity & Casualty Bond.

353 Q. That was after you had seen the Fidelity & Casualty Company Bond? A. Well, I don't know whether I had seen it but I knew what the terms called for; I think I saw it because I discussed it with other clients.

Q. Had you discussed it with Mr. Burden? A. Yes.

Q. Is it not a fact that you were the first one that told Mr. Burden what the terms of the Fidelity Bond would be? A. In general terms I told Mr. Burden that the Fidelity Bond guaranteed the honest turning over of the money by the collector and also guaranteed the sales; that is what I told him.

354 Q. Did you tell Mr. Burden that you had found out that there was no place for Mr. Burden that the bond provided for certain services for which he could charge 1 per cent. extra in addition to the 6 per cent? A. I don't think that I told him that.

Q. Did you suggest in any way to him a way by which the 1 per cent extra could be charged? A. I did not.

Q. And you didn't discuss that with him in connection with the Fidelity Bond? A. The ways and the wherefores why 1 per cent would be charged?

Arthur J. Koehler—Cross:

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Q. Yes? A. No, I don't think I did.

Q. But there was some conversation between Mr. Burden and yourself and Mr. Canfield in relation to the extra one per cent? A. I told Mr. Canfield it would cost him that much money.

Q. And were you the first one that told Mr. Canfield that? A. I was.

Q. Now, what led up to the discussion of the 1 per cent with Mr. Canfield? A. Why, naturally, Mr. Canfield wanted to know what it was going to cost him; he paid more money on previous loans.

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Q. Never mind about previous loans; about this loan; what led up to your telling Mr. Canfield he would have to pay 1 per cent extra? A. What led up to the facts? I told him the conditions on which the arrangement could be made with Burden.

Q. What were those? A. That it would cost him on \$10,000 \$1,800 a year.

Q. Did you explain how it would cost him that? A. No, I told him that is what it would cost him.

Q. Without explaining the details of it? A. No.

Q. Now, who told you or, what led you to make that statement to Mr. Canfield? A. Because Mr. Canfield wanted to know what it was going to cost him always when I made a loan for him.

357

Q. Did you make that statement on your own initiative or because of your talk with Mr. Burden? A. Certainly Mr. Burden told me what it was going to cost before I told Mr. Canfield, otherwise I would not have known it.

Q. Now, did you have any talk with Mr. Burden about the contracts or, the way that they should be drawn up? A. No.

358

Arthur J. Koehler—Cross.

Q. Did you have a talk with Mr. Canfield about the way the contracts should be drawn up? A. No.

Q. Did you know who was to prepare the contracts? A. Why yes, Mr. Burden told me his lawyer.

Q. But you had no talk either with Mr. Canfield or Mr. Burden as to what the contents of those contracts should be or the terms? A. I talked it over with Mr. Burden in this way; that he told me that the Fidelity Company insisted upon having a contract drawn in a certain way, that he had to have the contract drawn to conform to their views.

Q. Did you see Mr. Canfield between the time that you went to him and told him what it would cost him to get this money and the time that he signed the contract? A. I think I did several times, yes.

Q. And had talks with him about it? A. Probably.

Q. But you don't recall now what the purport of the conversation was? A. No.

Q. Did you have a conversation with Mr. Burden, interviews with Mr. Burden in the interim between the time you told Mr. Canfield what it would cost and the time the contracts were sold? A. I think I did.

Q. Was that the time you talked about the way the contracts should be drawn up? A. I didn't tell him how the contracts should be drawn up because I had no—that was a matter outside of my province.

Q. But, did you discuss the terms at all? A. I think I did, generally.

Q. But you don't recall now what they were? A. No.

William H. Burden—Direct.

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Q. You don't know how many times Mr. Burden saw Mr. Canfield when you were not present? A. No, I haven't the slightest idea.

Q. Did you have any talk with the members of the Fidelity & Casualty Company? A. No, I never met them.

Q. Did you ever see the bond of the Fidelity Company in this matter? A. No, I didn't, I never saw—

Q. Was the bond in the office of Mr. Canfield at the time the contract was signed? A. I don't know.

362

Q. Did you see it? A. I did not.

Q. Was there anything said by Mr. Burden or Mr. Canfield about the bond at the time this contract was signed? A. I think that Mr. Burden said that we would have to take those contracts to the Fidelity Company so as to have the bond issued.

Q. That is all you remember about that? A. That is all I remember about that just now, yes.

Q. So that the contracts were signed, as far as you know prior to the time that the bond was signed. A. That is my impression.

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Subscribed to before me this {
day of 1911. }

REFEREE IN BANKRUPTCY.

WILLIAM H. BURDEN, re-called, testified as follows:

Direct examination by Mr. Crawford:

Q. Mr. Burden, at any conversation with Mr. Canfield did you ever say to him that you wished

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William H. Burden—Direct.

to become a partner in his business? A. I did not.

Q. Or to become a partner with him in any respect? A. I did not.

Q. Was the subject of your becoming a partner in his business or with him in any way ever mentioned? A. No.

Q. Did Mr. Canfield at any time ever ask you what the purpose in the stipulation in the contract Exhibit A with respect to the 1 per cent. was for? A. No.

365 Q. Did you ever say to Mr. Canfield that that was for a bonus? A. No.

The Receiver.—I object because he said Mr. Canfield never spoke to him about the 1 per cent; I think the witness is precluded.

The Referee.—Overruled.

The Receiver.—An exception.

Q. Did you ever say to Mr. Canfield that that was to cover a usury charge or usury? A. I never did.

366 Q. Was the word usury ever used in any conversation that you had with Mr. Canfield? A. It wasn't.

Q. Was the word bonus ever used? A. No, sir.

Q. Did you ever say to Mr. Canfield that there were no services to be rendered? A. No, sir.

Q. Did you ever say to Mr. Canfield that you wanted 2 per cent per month for the use of the money? A. I did not.

Q. Did Mr. Canfield ever say to you that he needed the money? A. He said he could use the money.

Q. What did he say in connection with his use of the money? A. He said he wanted to increase

William H. Burden—Direct.

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his business, he could increase his business by the having of it.

Q. Upon cross-examination you stated that you made a partial examination of the books; now please state just what you did? A. I compared the statements of accounts with the ledger and also compared the different shipments in the statements with the shipping receipts and invoices.

Q. When was that done? A. That was on the 16th of December.

Q. How long were you occupied with that on the 16th of December? A. Pretty much all day; I commenced about 10 o'clock in the morning and worked until 6 o'clock in the afternoon, save half an hour for lunch. 368

Q. Did you make any further examination of any sort or comparisons? A. I did, in January.

Q. Yes, well, on what date in January? A. January 5th.

Q. What did you do on January 5th? A. Examined the shipping receipts and invoices of shipments to Canfield.

Q. How much time did that take on the 5th of January? A. I worked about half a day.

Q. Did you make any further examination or comparisons? A. Yes, on the 13th of January I made another examination. 369

Q. And what did you do then? A. Examined the shipping receipts for the shipments embraced in the statements of account that he assigned to me.

Q. How much of your time did it take on the 13th of January? A. About half a day.

Q. Before executing the contract with Mr. Canfield did you make an estimate of the amount of time that it would require for you to examine the

shipping receipts covering the shipments in the accounts to be assigned and make at least monthly an examination of the accounts of Mr. Canfield which should embrace a complete examination of the books, accounts and vouchers of Mr. Canfield as respects the accounts covered under the assignment and a strict comparison between all unpaid accounts as such accounts appeared on the records of Mr. Canfield and as such accounts appeared on the books of original entry; I ask you if you made such an estimate? A. Yes, sir.

371 Q. What was your estimate at that time; how did you make it up? A. I estimated that the work of examining the books and shipping receipts required, would take from 5 to 6 days each month.

Q. On what basis? Well, state how you made up your estimate; how you got it out? A. There was a further answer to that.

Q. Go on and state? A. I said 5 or 6 days.

Q. Now, state how you made up that estimate?

Mr. Engel.—I object to what the witness thought it would take him.

372 A. Under the requirement of the bond I estimated in addition to the 5 or 6 days that was mentioned that there was a possibility that I would be required to give considerable additional time for the reason that in case the accounts were not paid promptly I would have to give notice to the debtors under the requirements of the bond.

The Receiver.—Objected to as not competent.

The Referee.—Overruled.

William H. Burden—Direct.

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Q. Go on, Mr. Burden? A. That in that case I would have to notify the debtors of the assignment to me, and it was required that I should do that service by registered mail. I would also have to take up the collection of the accounts, which would involve additional work and the time and trouble.

Q. Then, now, you said it would require—now, how did you arrive at your estimate that it would take from 5 or 6 days in each month to make the examination prescribed by the contract and the terms of the bond? A. From my talks with Mr. Canfield regarding the accounts I estimated that they would average about \$100 each; that there would be embraced in the accounts, some of them, several charges for shipments; that upon an advance of \$10,000 at 75 cents on the dollar on the accounts there should be at least 100 accounts. Upon this basis I estimated that it would require the time stated in the previous answer; also of additional time under certain circumstances.

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Q. At the time of the making of this contract did you intend this charge of 1 per cent which is spoken of in the contract as compensation for labor and services; did you intend that that should be a charge for interest? A. No, sir, I did not.

375

Q. Had you at any time any intention to charge more than 6 per cent for interest on the advance? A. No, sir.

Q. And that was intended by you to be a charge for services exactly as it is stated in the bond? A. It was.

Q. Was that on your part intended as a subterfuge to cover any usury charge? A. It was not.

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William H. Burden—Direct.

Q. Was that inserted there in perfect good faith? A. It was.

The Receiver.—All this testimony is under our objection.

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Q. How did you—why was the compensation for services measured by a percentage on the amount of the outstanding advance— A. The work to be performed depended almost entirely on the number of accounts and the amount of them, and it would be the fairest and most equitable way of computing the compensation by a percentage upon the amount of the accounts outstanding and uncollected.

Q. Prior to the making of this contract with Mr. Canfield had you had any experience in the way of examining books and vouchers? A. I had.

Q. What experience did you have? A. I had had almost a lifetime's experience as a bookkeeper and accountant.

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Q. Well, state in a little more detail what that experience was? A. Well, I was a bookkeeper a great many years and after I gave up actively keeping the books I still retained my connection as head bookkeeper for many more years; I was general office manager at the same time and cashier.

Q. With what concerns were these? A. My first bookkeeping was as Assistant Treasurer of the Central Railroad of Georgia.

Q. Then what concerns were you connected with? A. After that I was connected as bookkeeper for Ross & Coleman of Macon, Ga.

Mr. Engel.—We will concede that he is an expert bookkeeper and accountant.

Q. You were at one time President of the American National Bank of Macon, Ga? A. I was.

Cross examination by Mr. Engel:

Q. Now, Mr. Burden you say you examined these books 3 times, is that correct? A. No, sir, I didn't say I examined them three times; I don't think I said that.

Q. How many times do you say you examined these books? A. I compared the statement that one time with the books, the statement of December 16th.

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Q. Was that the only time? A. Yes, sir.

Q. Weren't you required under the conditions of the bond to make a thorough examination of the books? A. I was.

Q. But you did not? A. The time had not arrived for doing so.

Q. You haven't done so? A. Not as yet, no sir.

Q. Now, Mr. Burden you made this loan to Mr. Canfield for profit, did you not, you wanted to make some money on your own money? A. I wanted the interest and an additional percentage for my services as required—

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Q. But you made this loan for the purpose of making this 6 per cent interest? Isn't it; this loan of \$10,000? A. Yes, sir.

Q. Now, then, let me ask you, you testified at a previous hearing that you borrowed this money? A. I did temporarily, yes sir.

Q. From whom did you borrow this money? A. The Corn Exchange Bank.

Q. Weren't you required to pay them 6 per cent interest for that same amount of money? A. I got it for less.

Q. How much? A. 5 per cent.

Q. So now you want to change your testimony to say you made this loan for a profit or 1 per cent or 6 per cent? A. What question do you ask me; I don't see.

Q. Is it not a fact that if you paid the Corn Exchange Bank 5 per cent for the use of this money all you made was 1 per cent? A. I was to get 6 per cent for my money; what I got it for was a different matter.

383 Q. Answer my question? Is it not a fact that you got from Mr. Canfield as you contend, 6 per cent and paid 5 per cent to the Bank for the same money, is that right? A. I was paying 5 per cent to the Bank.

Q. So that all you claim you made then, in your testimony, is 1 per cent for loaning this money to Canfield, isn't that correct? A. Not quite 1 per cent; yes a little over 1 per cent.

Q. In what manner is it not 1 per cent? A. I paid 5 for it and was getting 6.

Q. Then all you made was 1 per cent? A. It was for the time.

384 Q. It is correct? A. 1 per cent and a fraction over.

Q. Then, all you say you made is 1 per cent and a fraction over? A. The difference between 5 and 6.

Q. So that when you testified in this proceeding that you made this loan for a profit of 6 per cent are you mistaken? How long was this loan outstanding with the Corn Exchange Bank of yours? A. It was on demand.

Q. How long is it outstanding, please answer my question?

William H. Burden—Cross.

385

The Referee.—How long remain unpaid?

A. I paid half in a few days and the other is still owing.

Q. Did you hear Mr. Crawford state to us at the previous hearing we don't want long terms in this case we want to close this matter because Mr. Burden has to pay his bank, must return the money to the bank? A. You didn't ask me the question; I didn't hear that.

Q. Did you hear Mr. Crawford say words to that effect? A. I didn't hear that.

386

Q. Did you hear Mr. Crawford give any reasons for having a speedy termination of this examination? A. I did not.

Q. Did Mr. Crawford make any request for a speedy termination of this examination at any time? A. I don't remember to have heard him.

Q. You don't remember hearing anything of that? A. No.

Q. Is any part of that loan from the Corn Exchange Bank still outstanding? A. Half is still outstanding.

Mr. Crawford.—I offered previously, Mr. Referee, some statements of the accounts assigned, delivered by Mr. Canfield to Mr. Burden. They were objected to at the time because the original assignments were in evidence.

387

Now, it has been attempted to be brought out in cross examination here that the accounts that Mr. Burden took under these assignments were only to run a few days. These, if you look at them, show the due dates as you see of April 1. I want to offer

388

those again for that purpose. They have been excluded but in view of the testimony that has been brought out, I want to put them in for that purpose. List furnished by Mr. Canfield at the time by him showing the due dates of those accounts, not that they were short time accounts but were to run for four months.

Mr. Engel.—I don't object.

389

Mr. Crawford.—I offer in evidence the original list of accounts delivered by Mr. Canfield to Mr. Burden on the 5th day of January, 1911, and headed List of Accounts this Day, January 5th, sold and assigned by A. L. Canfield to W. H. Burden, etc.

The Referee.—For the sake of convenience put them all in at once.

Mr. Crawford.—I offer in evidence the paper signed by A. L. Canfield and delivered by him to William H. Burden on January 13, 1911, and headed List of Accounts this Day Sold and Assigned by A. L. Canfield to W. H. Burden, etc.

The Referee.—An absolute sale of the accounts?

390

Mr. Crawford.—Yes sir, the absolute assignment of the accounts? But there was a stipulation that when the accounts were collected Mr. Canfield had an equity in the balance that might be due afterwards.

I also offer in evidence the original paper delivered by A. L. Canfield to William H. Burden on December 16, 1910 headed List of Accounts this Day Sold and Assigned by A. L. Canfield to W. H. Burden.

(Papers Marked Claimant's Exhibit No. 2 in Evidence, March 2, 1911.)

Mr. Crawford.—I will stipulate on the record that the witness Herzog is the same as C. S. Hess; is the S. Hess whose name appears as the witness on Claimant's Exhibit A, she having been married since that time. 391

Subscribed to before me this }
day of 1911. }

REFEREE IN BANKRUPTCY.

Hearing adjourned to March 6, 1911, 12:00 M.

392

393

394

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Bankruptcy.

In the Matter

*of*A. L. CANFIELD,
Bankrupt.Before:
William H.
Willis, Esq.,
Referee in
Bankruptcy,
80 Wall Street.

395

New York, March 8th, 1911, 12 M.

HEARING ON RECLAMATION PROCEEDINGS OF
WILLIAM H. BURDENPROCEEDED PURSUANT TO ADJOURN-
MENT.

NO APPEARANCES.

396 Stipulation admitting in evidence schedules of
the bankrupt's indebtedness signed by counsel for
the claimant and the Receiver filed.

Schedules marked

(Claimant's Exhibit 3, March 2, 1911).

HEARING CLOSED.

(Endorsed:)—In the District Court of the United
States for the Southern District of New York.—
In Bankruptcy.—In the Matter of Abram L.
Canfield, Bankrupt.—Before William H. Willis,
Esq., Referee in Bankruptcy.—Minutes of
Hearing on Reclamation Proceeding of William
H. Burden.

Exhibit A, February 7, 1911.

397

This Exhibit is the same paper as Exhibit C annexed to the Petition.

Exhibit B, February 7, 1911.

This Exhibit consists of 46 separate papers, one of which was in the following form:

Monthly Statement.

Telephone 1765 Beekman. 398
 Bought of A. L. CANFIELD,
 97 Beekman Street.
 New York, , 191 .
 M. . . . H. S. Landsman & Son,
 Danbury, Conn.
 Terms, Net 60 days, 2 off 10.
 1910.

Aug. 10	34.90	
Sept. 8	110.38	
Oct. 21	13.44	
Nov. 4	36.60	
16	40.50	
30	1.00	236.82
	<hr/>	399

For and in consideration of the sum of One Dollar and other good and valuable considerations to me in-hand paid by William H. Burden, of the City of New York, the receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer and set over unto said William H. Burden, the account and claim against H. S. Landsman & Son, Danbury, Ct., amounting to \$236.82 hereto attached, and the money to be paid thereon; and I

400 do hereby represent that there has been no previous assignment of said account; that the whole amount thereof is just and true; that there are no defenses or counterclaims thereto; that no payments have been made thereon, and that the goods referred to in said account have been shipped to the debtor and have been accepted by him.

IN WITNESS WHEREOF, I have hereunto set my hand the 4th day of January, 1911.

A. L. CANFIELD.

401 The other 45 papers included in the Exhibit were in the same form, except as to the names of the debtors, the items and amounts. The whole number of items included in the 46 papers is 239.

Exhibit E, February 7, 1911.

This exhibit consists of 63 separate papers, all in the form set forth in the abstract of Exhibit B, but differing as to the names of the debtors, the items and amounts. The whole number of items included in these 63 papers is 225.

402

Exhibit 1, February 24, 1911.

A. L. CANFIELD

Statement of Business

November 25th, 1910.

ASSETS.

Cash on hand,	\$ 110.00
Cash in bank,	6,105.41
Bills Receivable,	15,728.14

Accounts " ,	39,810.30	403
Mdse. on hand cost,	22,012.18	
Real Estate	5,000.00	
Patterns, &c.,	1,500.00	
Fixtures,	1,500.00	
Stock Holdings,	12,500.00	\$104,266.03

LIABILITIES.

Owe for merchandise and notes not due 33,552.13

	Surplus	70,713.90
Losses for year	375.98	
Business Increase	20%	404
Net Gain for year	5,100.00	
Insurance Carried	21,500.00	

I, ABRAM L. CANFIELD, do hereby declare that the above is a just and true statement of the condition of my business on the 25th day of November, 1910; that since said date there has been no change by which the condition of said business has become less favorable; and that this statement is made as an inducement to William H. Burden to enter into the contract dated this day.

Dated, New York, December 14th, 1910.

A. L. CANFIELD. 405

406

Exhibit 2, February 24, 1911.

ASSIGNED-ACCOUNTS BOND.

THE FIDELITY AND CASUALTY COMPANY

OF NEW YORK,

Home Office, 92 Liberty Street, New York City.

No. 409071

THIS BOND WITNESSETH:

407

WHEREAS, Abram L. Canfield of 97 Beekman St., New York City, hereinafter called the Principal, has entered into an agreement with William H. Burden, of 612 West 140th St., New York City, hereinafter called the Obligee, a copy of which is attached hereto and made a part hereof:

408

NOW, THEREFORE, in consideration of a certain premium, The Fidelity and Casualty Company of New York, hereinafter called the Company, does hereby agree that it will reimburse the Obligee for the loss, not exceeding Seven Thousand Five Hundred dollars, of any money or other personal property—(1) through the sale, assignment, pledge or transfer under the said agreement by the Principal to the Obligee, during the term of this bond, of any account wholly or partly fictitious; (2) through the failure of the Principal during the term of this bond to deliver to the Obligee all money and other property received by the Principal during the said term on accounts sold, assigned, pledged, or transferred under the said agreement.

The foregoing agreement is subject to the following conditions:

I. The term of this bond begins on the 15th day of December, 1910, at noon, standard time at the Obligee's address hereinbefore stated,

and ends on the 15th day of December, 1911, at noon, standard time at the said address. 409

2. The liability of the Company under this bond shall not exceed the amount above written, whether the loss shall occur during the term above named, or during any renewal or renewals thereof, or partly during the said term and partly during any renewed term or terms.

3. The Company may at any time terminate its liability under this bond as to future acts of the Principal by a written notice, served on the Oblige, or sent by registered mail to the Oblige at the address hereinbefore stated, at least ten days before the cancelation takes effect. In case of such termination the unearned part of the premium shall be returned to the Oblige at the expiration of all liability hereunder. The Company's check served on the Oblige, or sent by registered mail to the Oblige at the address hereinbefore stated, shall be a sufficient tender of the said unearned premium. 410

4. If the Oblige shall learn that the Principal or any one connected with the Principal is not observing in good faith the conditions of the said agreement with the Oblige, the Oblige shall immediately give the Company in writing at its home office the fullest information obtainable at the time, and shall make no further payments or advances to the Principal, and shall take all steps that are proper for the protection of the interests of the Oblige and the Company. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Company at its home office within three months after the discovery of such loss. 411

5. In the event of a claim under this bond the Oblige, whenever required by the Company to

- 412 do so, shall give the Company all the information and evidence possessed by the Obligee, and shall, at the request and cost of the Company, aid in securing information and evidence, and shall render all assistance (other than pecuniary assistance) that the Obligee can render, for the purpose of bringing to justice, prosecuting, and convicting criminally the Principal, or any one connected with the Principal, and for the purpose of enabling the Company to procure reimbursement from the Principal, or from any one connected with the Principal, or from the estate of the Principal or of any one connected with the Principal,
- 413 of any loss, damage, or expense sustained by the Company under this bond.

6. Upon the discovery by the Obligee of any dishonest act of the Principal, or of any one connected with the Principal, this bond shall terminate as to any act of the Principal thereafter.

7. The Obligee shall duly observe and enforce all the provisions of the said agreement, except as such provisions may conflict with the following conditions, namely: a. The Obligee shall require the Principal to state in writing at the time of assigning each account the date when the payment of such account is due, and if the payment of any account is not made within twenty days of the date that such payment is due, the Obligee shall immediately thereupon make demand by registered mail upon the debtor for the amount due; b. The Obligee shall require the Principal to file with the Obligee in connection with each account a certificate signed by a responsible official or employee of the Principal stating that the account referred to in the certificate represents a bona-fide sale, and that the merchandise concerned with the account has prior to the signing of the
- 414

certificate, been shipped to the customer named in the account; c. The Obligee, at least monthly, shall make an examination of the accounts of the Principal which shall embrace—(1) a complete examination of the books, accounts, and vouchers of the Principal as respects the accounts covered under the said agreement; (2) a strict comparison between all unpaid accounts as such accounts appear on the records of the Obligee and as such accounts appear in the books of original entry of the Principal. 415

8. If the Obligee shall at the date of this bond or at any time thereafter hold in addition to this bond any guarantee, bond, or other security, whether valid or not, against loss by reason of any default of the Principal covered by this bond, the Company shall not be liable hereunder for a larger proportion of any loss than the proportion that the amount of this bond bears to the total amount of security against the said loss; but this condition shall not apply to agreements of indemnity or bonds of indemnity executed and delivered to the Obligee by any person, persons, or corporation not engaged in the business of suretyship or insurance; provided that the Company shall be subrogated to all rights of the Obligee against any such person, persons, or corporation to the amount of any payment made by the Company; and provided further that the Obligee shall execute all papers required for such subrogation and shall co-operate with the Company to secure to the Company such rights. 416 417

9. Legal proceedings for recovery hereunder may not be brought until after three months from the date of filing proofs at the Company's home office, nor brought at all unless begun within twelve months from the time of the discovery of

448 *Notarary.* If any limitation set forth in the conditions or conditions mentioned & is prohibited by the statutes of the state in which this bond is issued, the said limitation shall be considered to be amended to agree with the minimum period of limitation permitted by such statutes.

449 If no attempt is made regarding in this bond as originally printed, any change or change of any of the terms or conditions or statements, whether made before or after the date of this bond, shall be valid unless set forth in an endorsement added hereto and signed by the president, the vice-president, or one of the secretaries of the Company. Nothing herein shall be held to constitute any agent or any other person, whether named or unnamed before or after the date of this bond, shall be held to waive any of the terms or conditions or statements of this bond, or to preclude the Company from asserting any defense under the said terms, conditions, and statements, unless set forth in an endorsement added hereto and signed by one of the said officers.

450 In Witness Whereof the Company has caused this bond to be signed by its president and its vice-president and secretary; but this bond shall not be binding upon the Company unless it shall be countersigned by a duly authorized representative of the Company.

George F. Howes,

President.

Howe J. Howes,

Vice-Pres. and Secy.

Countersigned by H. M. Anderson.

Examined by H. A., entered by H. A.

ENDORSEMENT.

421

THE FIDELITY AND CASUALTY COMPANY OF NEW
YORK.

H. A.

Form Special.

Date, December 15, 1910.

That part of this bond beginning with the figure "421" in line 16 and ending with the word "agreement" in line 19 is hereby amended to read as follows:

"(2) through the failure of the Principal during the term of this bond, or within six months from the expiration, termination, or cancellation thereof, to deliver to the Obligor all money and other property received by the Principal during the said term of this bond on accounts sold, assigned, pledged, or transferred under the said agreement; or received by the said Principal within six months from the expiration, termination, or cancellation of this bond on accounts sold, assigned, pledged, or transferred under the said agreement during the said term of this bond."

422

The word "ten" in line 66 of this bond is hereby amended to read "twenty."

It is hereby understood and agreed that the written statement of the Obligor, that he has made the examinations required by section c of condition numbered 7 and has inspected the invoices from the factories, according to the terms of the contract referred to in this bond, when served upon the Company at its office in the City of New York, shall be deemed *prima facie* evidence of such facts.

423

This endorsement is attached to and forms a part of Bond No. 409,071 issued by the Company to William H. Burden.

GEO. W. ALLEN,

H. A.

Assistant Secretary.

424

Exhibit 1, March 2, 1911.

Retired merchant, not desiring partnership, will loan established rated party \$10,000-\$20,000 (6%), same carrying responsible position. B., 139 Herald, Downtown.

Exhibit 2, March 2, 1911.

This exhibit consists of three lists of accounts assigned. The first is headed as follows:

- 425 List of accounts this day Jany. 5, 1911, sold and assigned by A. L. Canfield to W. H. Burden in pursuance of the contract made between them dated December 14th, 1910, amended Decr. 16" 1910 (Transfers on said accounts being dated Jany. 4, 1911).

The body of the list is the same as Schedule A annexed to the petition.

The second list is headed as follows:

NEW YORK, JANY. 13, 1911.

- 426 List of accounts this day sold and assigned by A. L. Canfield to W. H. Burden in pursuance of the contract made between them dated December 14th, 1910. Amended December 16th, 1910.

The body of the list is the same as Schedule B annexed to the petition.

The third list included in Exhibit 2, March 2, 1911, is headed as follows:

List of accounts this day sold and assigned by A. L. Canfield to W. H. Burden in pursuance of contract made between them dated December 14" 1910.

The list contains the names and addresses of 93 different debtors, and the amounts owing from each, aggregating \$13,334.34.

Exhibit 3, March 2, 1911.**SUMMARY OF DEBTS AND ASSETS.**

[From the Statements of the Bankrupt, in Schedules A and B.]

Schedule A.	1	(1)	Taxes and Debts due United States.	
"	"	1	(2) Taxes due States, Counties, Districts and Municipalities.	
"	"	1	(3) Wages.	136.00
"	"	1	(4) Other debts preferred by law.	
Schedule A.	2		Secured Claims.	1,000.00
Schedule A.	3		Unsecured Claims.	26,763.21
Schedule A.	4		Notes and Bills which ought to be paid by other parties thereto.	55,214.76
Schedule A.	5		Accommodation paper.	11,500.00
Schedule A. Total.				103,413.97
Schedule B.	1		Real Estate.	5,000.00
Schedule B.	2—a.		Cash on hand.	
"	"	2—b.	Bills, promissory notes, and securities.	14,125.00
"	"	2—c.	Stock in trade.	12,000.00
"	"	2—d.	Household goods, &c.	
"	"	2—e.	Books, prints and pictures.	
"	"	2—f.	Horses, cows and other animals.	
"	"	2—g.	Carriages and other vehicles.	
"	"	2—h.	Farming stock and implements.	
"	"	2—i.	Shipping and shares in vessels.	
"	"	2—k.	Machinery, tools, &c.	1,500.00
"	"	2—l.	Patents, copyrights and trade-marks.	5,000.00
"	"	2—m.	Other personal property.	

Schedule B.	3—a.	Debts due on open accounts.	20,554.78
"	"	3—b. Stocks, negotiable bonds, &c.	7,600.00
"	"	3—c. Policies of insurance.	100.00
"	"	3—d. Unliquidated claims.	
"	"	3—e. Deposits of money in banks and elsewhere.	1,200.00
Schedule B.	4	Property in reversion, remainder, trust, &c.	
Schedule B.	5	Property claimed to be exempted.	150.00
Schedule B.	6	Books, deeds and papers, ledgers, day books, check books etc.	
Schedule B. Total.			67,229.78

Opinion.

433

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

Re

ABRAM L. CANFIELD,
Alleged Bankrupt.

BRUSH & CRAWFORD, for the petitioner,
ENGEL BROTHERS, for the Receiver.

434

HAND, District Judge:—

The first question is of the admissibility of oral testimony to contradict the written instrument. It would seem hardly necessary to show that the parties may not avoid the positive command of the sovereign by resorting to so easy a cover as reducing their agreement to writing, Wigmore, Section 2414. However, the case in Barbour is to the contrary, and there are other cases looking in the same direction. I regard *Scott v. Lloyd*, 9 Peters, 418, 446, as controlling, because in that case although the bargain took the form of the sale of an annuity charged on land, the court charged the jury that they might consider all the circumstances including matter in pais contradicting the deeds. This part of the charge the Supreme Court sustained after full discussion. So far as the case in Barbour itself goes, it is at least overruled by *Midgett v. Goler*, 18 Hun, 302. Nothing is more common than for courts to disregard the form of the transaction and find whether it is only a cover for violation of the statute; the books

435

- 436 are full of the unravelling of all sorts of ingenuities, which involve the contradiction of what the parties have written, *Mercantile Trust Co. v. Gimbernath*, 134 App. Div., 410. Upon principle there can be no doubt the parol evidence rule means only this; that where the parties have in any form said that a writing shall completely embody their engagements, the court can enforce none but the written stipulations without disregarding the very contract they have made, *Wigmore*, Sections 2429, 2430. When, however, the inquiry is whether the performance of the obligations contemplated, involves acts which are forbidden by law, the parties
- 437 have no power to determine the scope of that inquiry. Even if the writing expressly agreed that nothing but itself should be considered, the inquiry would still be whether notwithstanding that written stipulation they had made an illegal contract dehors the writing. If so, that original contract is void, and with it must fall the written agreement, whether the latter be regarded as a part of the total engagements between the parties, or as an independent contract made in performance of the prior oral contract. Nor can there be any estoppel against setting up the illegality of an agreement; that would be to evade the very purpose of the law in forbidding men to make it. It
- 438 would be peculiarly improper in the case as here of a statute designed to relieve the weaker party from some supposed oppression. Surely everyone must see that when the law relieves such an one from the consequences of his weaker position in the bargain, he may not be successfully tied up at the very time of his weakness from subsequently claiming protection.

On the merits I agree with the Master. It is of course, possible by consistent hostility not to enforce any statute of which one dis-

approves the purpose. Nothing short of 439
 such a determination can, I think, cover up the
 actual tenor of this transaction; and, if so, I
 have no right to relieve the lender, because the
 penalty is greater than I might wish, or even if
 the offence should seem to me to be no offence at
 all. To that particular kind of judicial usurpa-
 tion I will not yield. What then are the facts?
 The lender borrows all his funds at five per cent
 and lends them upon a troublesome collateral at
 six per cent. By that he gets \$100 per year and
 accepts a risk of \$10,000. So far there is small in-
 ducement by way of profit. However, he does get 440
 in addition \$1200 per year, making a net profit of
 \$1300 on his loan. That he explains, was no more
 than fair return for the work required of him as
 obligee under the guaranty bond; work which was
 undeniably substantial and vexatious. The ques-
 tion resolves itself into a consideration of whether
 \$1200 per year was clearly too much to pay for
 the work. What then was it and how did he cal-
 culate its worth. He says that he knew that the
 accounts would average about \$100 each and that
 there would be therefore always 100 of them out-
 standing. His substantial duties in regard to 441
 each were these; (a) to notify the debtor when-
 ever remittance to him from Canfield on any ac-
 count was twenty days in default; (b) to examine
 the books and vouchers of Canfield monthly and
 to compare the statements rendered by Canfield
 to him with the books of original entry. The
 work of comparison Burden says that he esti-
 mated would take five or six days every month,
 while the letters to overdue debtors would be an
 added labor. However, all the comparison re-
 quired upon ninety-eight accounts he said he in
 fact did in one day. It is of course possible that

- 442 his provisional estimates were honestly so far wrong as that, but, since he was himself a book-keeper, it is unlikely. It is also true that he made two other examinations in January, but these were for substituted accounts and there appears no reason to suppose that the parties originally contemplated substituted accounts or any other examination than the monthly one required in the bond. That being so, certainly Burden much miscalculated the labor involved in doing what was required. The labor of notifying delinquent debtors was necessarily uncertain, but if every debtor failed to pay—a ridiculous assumption—
- 443 it would not have equalled the difference between the pay for a day's work and the monthly interest rate. Indeed the accounts assigned apparently were only due in four months. There is just ground then for believing on Burden's own testimony alone that he hardly regarded the services mentioned as equal to the pay reserved.

- Moreover, the whole situation was most extraordinary. Why should Burden at the outset have sought a place at \$50 per week with light work as an accessory to a loan of \$10,000? It is perhaps not incredible, but it is certainly most unusual. Why thereafter should he lend money
- 444 that he did not have for the sake of \$100 and, again as an accessory, perform incidental services to secure the principal, which were worth \$1200? If he had been in search of employment, he might have thought to get it in this way for its own sake, but he advertised himself as a retired merchant with money to lend. If he honestly believed what he now says he was an extraordinary man; but if he saw a chance by borrowing to lend out at eighteen per cent he was a usual man. If, moreover, he looked about with his broker for ingenious fetches to elude the drastic usury law of New York, he

found one which under the circumstances had an
 apparent plausibility that was most promising. 445
 All the antecedent probability is therefore, with
 the trustee and against the claimant.

Nevertheless suspicion is not enough for the
 result is harsh. The added proof comes from the
 direct testimony. Canfield and Hess each swear
 squarely that the whole matter was a cover for
 usury; Koehler and Burden squarely contradict
 them. Burden has \$10,000 to lose; Koehler must
 naturally see his customer through if he has em-
 barked him in the difficulties and has suggested
 the device to him. Each of these has a strong
 personal bias to tell the story as they tell it. 446
 Canfield has his own proper bias as well, though not
 so direct as Burden's. If he should get his dis-
 charge, it is quite true that he would have no
 pecuniary interest in how the estate was divided
 between his creditors; still I think it not fanciful
 to assume that he has a reasonable motive to make
 the dividend to his general creditors as large as
 possible. If on the other hand his discharge be
 refused, he has an obvious motive now to tell a
 story which may protect him from successful suit
 hereafter upon this indebtedness. Further more
 the same story would serve to defeat objection
 to his discharge if that came from Burden himself, 447
 for it would show that he had no provable debt.
 Now I think that there is already in the case
 enough proof to show that Canfield may have some
 ground to fear for his discharge, without of course
 meaning to suggest any opinion upon that subject.
 While, therefore, it is undoubtedly true that of the
 two Burden is more directly concerned in the out-
 come since he has his money directly staked on
 the result, I cannot still regard Canfield as a dis-
 interested person. The same is not true of Her-
 zog's testimony, for I can see no motive which

448 she can have in telling what is not true. She is now married and presumptively not dependent upon Canfield for employment, nor is it indeed apparent that he is in a position to give her future employment, were she not. The question raised of her presence at the interview is largely verbal, for with such partitions with open windows in them giving sight into Canfield's room, and especially with the door left open, there is no reason to doubt that she was in a position to hear, as she claims she was.

449 However, were the case one merely of word against word, I should perhaps feel that the receiver had not carried the burden of proof which the defense puts upon him. The antecedent probability of Canfield's story, and the improbability of Burden's, supply a corroboration which turns the scale. It is not essential that I should say every reasonable doubt, as though Burden were being tried for the crime of piracy, but the preponderance of the proof is all that is required. Just what is meant by the phrase found in the books that the proof must be clear and convincing is not apparent, except it be that a court should be cautious. However, indecision, or hostility, is not caution, and here a determination for Burden can proceed only from one or the other.

450 Finally a word about the supposed equities of the situation. Whether or not the statute against piracy is too drastic, or is unwise economically, is in the first place no business of the courts, nor have they any right, even if they have the power, indirectly to substitute their own beliefs for those of the legislature, no matter which of the two is right. Here, however, there is not even the supposed room for such spurious considerations which at times prove potent in actual decisions, because the law of piracy is many decades old upon

the New York statute books, and everyone knows 451
 what chances he takes when he disobeys it. If
 my inference is right upon the facts, Burden de-
 serves not the slightest sympathy. He has in-
 vented a very ingenious and plausible device to
 evade the law, one of those manifold expressions
 of the pressure which economic necessity exerts
 in this matter to circumvent the popular will.
 When he did it, at the suggestion of his broker, he
 showed clearly enough that he was quite alive to
 what he was about, and to the risks he was taking.
 The play has gone against him, and he has no
 ground of complaint whatever. Therefore, the 452
 whole question is one of fact, to be regarded with-
 out the least color of sympathy or prejudice. If
 he did honestly make such a contract for so little
 profit, overweighted as it was with an incident of
 so much more consequence than the main motive
 itself, he is like any other creditor; if he was only
 one more money-lender, who will take the risk of
 forfeiture under the usury laws, in the hopes that
 he will not be caught, he has himself to blame for
 disregarding the will of the community in which
 he lives. I can have no doubt of the facts, and the
 report will be confirmed.

L. H. 453
 U. S. D. J.

454 **Order Confirming Report of Special Master.**

At a Stated Term of the District Court of the United States, held in and for the Southern District of New York, at the Post Office building, in the Borough of Manhattan, City of New York, this 13th day of July, 1911.

Present—HON. LEARNED HAND, Judge.

455

In the Matter

of

ABRAM L. CANFIELD,
Bankrupt.

456

The motion of the claimant for a re-argument of the motion to confirm the Special Master's report herein, and for a resettlement of the order filed herein on July 8th, 1911, having duly come on to be heard, upon reading and filing the affidavit of John J. Crawford, verified the 11th day of July, 1911, and after hearing counsel for the respective parties,

Now, on motion of Brush & Crawford, attorneys for the claimant, William H. Burden, it is

ORDERED, that the order entered herein on July 8th, 1911, be resettled so as to read as follows:

“At a Stated Term of the District Court of the United States, held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, this 8th day of July, 1911. 457

Present—HON. LEARNED HAND, Judge.

In the Matter

of

ABRAM L. CANFIELD,
Bankrupt.

458

A petition in reclamation having been filed by William H. Burden, as claimant against Clarence S. Houghton receiver herein, with this Court, for an order directing the said Receiver to pay over to the said petitioner certain funds the avails of accounts payable upon an alleged assignment claimed to have been made by the Bankrupt herein, to the said William H. Burden, and said Clarence S. Houghton, at the time when said petition was heard, having filed an answer thereto, in opposition, and the Court having thereupon duly made an order of reference concerning the matters in the said petition and answer; to the Honorable William H. Willis as Special Master, and thereafter the parties having appeared before the Special Master and offered their respective proofs, and said Special Master having thereafter duly made his report to this Court, which report was duly filed herein in the Office of the Clerk of this Court, recommending among other things, that the prayer of the petitioner, be denied, and that the said petitioner, William H. Burden, reassign and transfer to the receiver herein said accounts payable, in said petition described, and thereafter a motion having been duly made by the Receiver 459

460 herein for the confirmation of the said report of the said Special Master before the Court, and said motion having duly come on to be heard the 26th day of June, 1911, now on reading and filing the said petition and answer, on the testimony and exhibits, and on all papers filed and proceedings had herein, and on the report of the Special Master, and after hearing Counsel for the respective parties, and after due deliberation, ON MOTION OF ENGEL BROTHERS, attorneys for the Receiver, it is

ORDERED, ADJUDGED AND DECREED that the report of the Special Master herein, be and the same hereby is in all things confirmed, and it is further

461 ORDERED, ADJUDGED AND DECREED that the said claimant William H. Burden, within five days after notice of this order, reassign the said accounts in the petition herein described, by proper instrument in writing to Clarence S. Houghton, Receiver, herein."

LEARNED HAND,
U. S. D. J.

(Endorsed:)—United States District Court, Southern District of New York.—No. 14582.—In the Matter of Abram L. Canfield, Bankrupt.—Order.—Brush & Crawford, Attorneys for Claimant, 30 Broad Street, Borough of Manhattan, New York City.—U. S. District Court.—S. D. of N. Y.—Filed Jul 13, 1911.

Petition for Appeal and Allowance of Appeal. 463

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

ABRAM L. CANFIELD,
Bankrupt.

WILLIAM H. BURDEN,
Claimant.

In Bank-
ruptcy,
No. 14,582.

464

The above named claimant William H. Burden, conceiving himself aggrieved by the decree made and entered herein on the 8th day of July, 1911, and re-settled and re-entered on the 13th day of July, 1911, does hereby appeal to the Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit.

465

Dated, July 18, 1911.

BRUSH & CRAWFORD,
Attorneys for Claimant,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

- 466 The foregoing claim of appeal is allowed.
Dated, July 19, 1911.

VAN VECHTEN VEEDER,
D. J.

(Endorsed:)—United States District Court,
Southern District of New York.—No. 14582.—
In the Matter of Abram L. Canfield, Bankrupt.
—Petition for Appeal to Circuit Court of Ap-
peals.—Brush & Crawford, Attorneys for Wil-
liam H. Burden, Claimant, 30 Broad Street,
Borough of Manhattan, New York City.—U. S.
District Court, S. D. of N. Y.—Filed Jul 19,
1911.

467

468

Assignment of Errors.

469

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

*of*ABRAM L. CANFIELD,
Bankrupt.In Bank-
ruptcy,
No. 14,582.

470

And now, on this 18th day of July, 1911, come the claimant William H. Burden, and says that the final order of the District Court of the United States for the Southern District of New York, entered on the 8th day of July, 1911, and re-settled and re-entered on the 13th day of July, 1911, denying the application of the claimant for an order directing the Receiver to pay over to the claimant the moneys collected on certain accounts assigned by the bankrupt to the claimant, is erroneous in the following particulars:

471

First.—In that the witness A. L. Canfield was permitted to testify as follows: "I asked Mr. Burden just what he meant by that clause; why he said that was simply to get around the usury law."

Second.—In that the witness A. L. Canfield was permitted to testify that prior to the execution of the written contract between the witness and the claimant, the claimant said to the witness that he wanted six per cent. legal interest in addition

472 to one per cent. bonus every month for making the loan.

Third.—In that the witness Sadie Herzog was permitted to testify that at a conversation between the claimant and the bankrupt held before the execution of the written contract between them, the claimant said he wanted six per cent. and two per cent. besides.

473 *Fourth.*—In that the witness Sadie Herzog was permitted to testify that at a conversation between the claimant and the bankrupt held before said written contract was executed, the claimant said that he would agree to allow the bankrupt \$10,000 on assigned accounts and for this loan he should agree to give him six per cent; and one per cent. as a bonus, which was to cover the usury charge.

Fifth.—In that the court found that the stipulations in the contract between the claimant and the bankrupt respecting compensation for services to be performed by the claimant were not intended as stated in the written instrument.

474 *Sixth.*—In that the court found that the claimant intended to take or reserve interest at a higher rate than six per cent. per annum for the loan or forbearance of money.

Seventh.—In that the court found that the receiver was entitled to have the assignment of the accounts declared void without paying or offering to pay the money actually loaned.

Eighth.—In that the court refused to find that the statutes of New York under which the assign-

ment of the accounts to the claimant have been 475
declared void, deny to the claimant the equal protection of the laws.

Ninth.—In that the court refused to direct the Receiver to pay over to the claimant the moneys collected by the Receiver on the accounts assigned by the bankrupt.

WHEREFORE, the claimant prays that the said order may be reversed.

BRUSH & CRAWFORD,
Attorneys for Claimant, 476
No. 30 Broad Street,
Borough of Manhattan,
New York City.

(Endorsed:)—United States District Court,
Southern District of New York.—14582.—In
the Matter of Abram L. Canfield, Bankrupt.—
Assignment of Errors.—Brush & Crawford, At-
torneys for William H. Burden, Claimant, 30
Broad Street, Borough of Manhattan, New
York City.—U. S. District Court, S. D. of N. Y.
—Filed Jul. 19, 1911.

478

Stipulation.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

In the Matter

- of

ABRAM L. CANFIELD,
Bankrupt.

479

RECLAMATION PROCEEDING OF
WILLIAM H. BURDEN.

The parties hereto, by their respective attorneys, hereby stipulate that the following parts of the record in this proceeding shall be printed as the record upon the appeal herein, to wit:

The Petition.

The opposing Affidavit.

480

The report of the Special Master.

The testimony taken before the Special Master.

A statement that Exhibit A, February 7, 1911, is the same paper as Exhibit C annexed to the Petition.

The following abstracts of Exhibit B and E, February 7, 1911, viz.

Exhibit B, February 7, 1911, consists of 46 separate papers, one of which was in the following form:

Monthly Statement.

481

Telephone 1765 Beekman.

Bought of A. L. CANFIELD,

97 Beekman Street.

New York,.....191 .

M

H. S. LANDSMAN & SON,

Danbury, Conn.

Terms, Net 60 days, 2 off 10.

1910

Aug. 10	34.90	
Sept. 8	110.38	
Oct. 21	13.44	
Nov. 4	35.60	
16	40.50	
30	1.00	236.82

482

For and in consideration of the sum of One Dollar and other good and valuable considerations to me in hand paid by William H. Burden, of the City of New York, the receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer and set over unto said William H. Burden, the account and claim against H. S. Landsman & Son, amounting to \$236.92 hereto attached, and the money to be paid thereon; and I do hereby represent that there has been no previous assignment of said account; that the whole amount thereof is just and true; that there are no defenses or counterclaims thereto; that no payments have been made thereon, and that the goods referred to in said account have been shipped to the debtor and have been accepted by him.

483

In Witness Whereof, I have hereunto set my hand the 4th day of January, 1911.

A. L. CANFIELD.

484 The other 45 papers included in the Exhibit were in the same form, except as to the names of the debtors, the items and amounts. The whole number of items included in the 46 papers is 239.

Exhibit E, February 7, 1911, consists of 63 separate papers, all in the form set forth in the abstract of Exhibit B, but differing as to the names of the debtors, the items and amounts. The whole number of items included in these 63 papers is 225.

Exhibits 1 and 2, February 24, 1911.

Exhibit 1, March 2, 1911.

485 The following abstract of Exhibit 2, March 2, 1911, viz:

Exhibit 2, March 2, 1911, consists of three lists of accounts assigned. The first is headed as follows:

List of accounts this day Jany. 5, 1911, sold and assigned by A. L. Canfield to W. H. Burden in pursuance of the contract between them dated December 14th, 1910, amended Decr. 16th 1910 (transfers of said accounts being dated Jany. 4, 1911).

The body of the list is the same as Schedule A annexed to the petition.

486 The second list is headed as follows:

New York, Jany. 13, 1911.

List of accounts this day sold and assigned by A. L. Canfield to W. H. Burden in pursuance of the contract between them dated December 14th, 1910. Amended December 16th, 1910.

The body of the list is the same as Schedule B annexed to the petition.

The third list included in Exhibit 2, March 2, 1911, is headed as follows:

List of accounts this day sold and assigned by A. L. Canfield to W. H. Burden in pursuance of

contract made between them dated December 14" 487
1910.

The list contains the names and addresses of 93 different debtors, and the amounts owing from each, aggregating \$13,334.34.

That part of Exhibit 3, March 2, 1911, which is headed:

"Summary of Debts and Assets."

The opinion of the Court.

The order of the District Court, as re-settled on July 13th, 1911, confirming the report of the Special Master.

The appeal and allowance of appeal.

The assignment of errors.

488

Dated, New York, August 11th, 1911.

BRUSH & CRAWFORD,
Attorneys for William H. Burden,
Claimant.

ENGEL BROS.,
Attorneys for Receiver.

(Endorsed:) United States District Court, Southern District of New York. In the Matter of Abram L. Canfield, Bankrupt. Reclamation Proceeding of William H. Burden. Stipulation. Brush & Crawford, Attorneys for Claimant, 30 Broad Street, Borough of Manhattan, New York City, U. S. District Court, S. D. of N. Y. Filed Sept. 18, 1911. 489

490 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

In the Matter of Abram L. Canfield, Bankrupt.
 Reclamation Proceeding of William H. Burden.

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of so much of the record of the District Court in the above-entitled matter as is mentioned in the stipulation of the parties filed herein and printed herewith.

491 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 21st day of September, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States, the one hundred and thirty-sixth.

(Seal)

THOS. ALEXANDER,
 Clerk.

United States Circuit Court of Appeals for the Second Circuit,
October Term, 1911.

Argued January 6, 1912; Decided February 14, 1912.

No. 134.

In the Matter of ABRAM L. CANFIELD, Bankrupt.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Lacombe, Coxe, and Ward, Circuit Judges.

On Appeal from an Order of the District Court in Bankruptcy Confirming a Report of the Special Master and Ordering that William H. Burden within Five Days Re-assign Certain Accounts to Clarence S. Houghton, Receiver in Bankruptcy.

The following agreement was entered into between the bankrupt and William H. Burden, the appellant:

"This Agreement, made this 14th day of December, 1910, between Abram L. Canfield, of the Borough of Manhattan, City of New York, party of the first part, and William H. Burden, of the same place, party of the second part. Witnesseth:

That in consideration of the premises and the mutual covenants and agreements hereinafter mentioned, and of the sum of One Dollar paid by the party of the second part to the party of the first part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties hereto have agreed as follows, viz.:

I. The party of the first part shall assign and transfer to the party of the second part approved accounts due from reputable debtors, and the party of the second part shall pay therefor a sum equal to seventy-five per cent. of the total amount thereof, not to exceed over Ten thousand Dollars, unless he shall elect to advance a larger sum.

II. The said accounts shall be for goods sold and delivered in good faith to the respective persons against whom the accounts exist, and in all cases, the said goods shall have been accepted by such persons.

III. All accounts assigned under this agreement shall result from the sale of goods shipped either from the place of business of the party of the first part in the City of New York, or from one of the following factories:"

(Here follows a list of ten companies.)

"IV. Where the goods shall be shipped from the place of business of the party of the first part, the original shipping receipts covering the shipment referred to in the account shall be submitted to the party of the second part for his inspection at the time of the assignment of the account, and where the goods shall be shipped from one

of the factories aforesaid, the invoice sent by the said factory to the party of the first part shall be submitted in like manner.

V. The party of the first part shall act as the agent of the party of the second part in collecting the said accounts, but as remittances shall be received therefor, the checks and drafts shall be immediately delivered to the party of the second part, so endorsed as to make them payable to him.

VI. The party of the first part hereby guarantees that each account so to be assigned will be paid within ten days after the same shall become due, and if any such account shall not be so paid, the party of the first part shall pay to the party of the second part the full amount thereof, after ten days' notice in writing, and thereupon the party of the second part shall re-assign the same to the party of the first part; and if the party of the first part shall fail to so pay the amount of any such unpaid account, the party of the second part, at his election, may revoke the agency of the party of the first part to collect any of said accounts then uncollected.

VII. The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain uncollected.

VIII. Until all said accounts shall have been collected or re-assigned, the party of the second part shall have the right to examine at all reasonable times, the books of accounts and vouchers of the party of the first part, which examination may be made either personally or by his duly authorized agent.

IX. When the amount collected on said accounts and turned over to the party of the second part shall amount to the total sum advanced thereon, with interest at the rate of six per cent. per annum, and the party of the second part shall have received out of said collections his compensation for services as above mentioned, and all disbursements made or liabilities incurred, for exchange, or for attorney's fees, or other expenses, in and about the collection of said accounts, he shall re-assign to the party of the first part all accounts then uncollected.

X. Until the termination of this contract by mutual consent, all further purchasers of accounts by the party of the second part from the party of the first part shall be subject to the terms hereof."

Canfield paid the premium for the bond conditioned to indemnify Burden against loss arising from the unfaithfulness of Canfield in collecting assigned accounts. The services to be performed by Burden were to require Canfield to deliver a statement of the due date of each assigned account and, if payment were not made within twenty days, to himself make demand upon the debtor for the amount due; to require a responsible employee of Canfield to certify that each account assigned represented a bona fide and actual shipment in pursuance thereof; to make a monthly examination of Canfield's books,

accounts and vouchers and a comparison between all unpaid accounts on his own list and such accounts on Canfield's books.

On January 18, 1911, a petition in bankruptcy was filed against Canfield and a receiver appointed. On that date he owed Burden \$10,512.72.

The Receiver proceeded to collect the accounts assigned to Burden, whereupon Burden instituted reclamation proceedings in the District Court praying that the Receiver might be required to pay over to him the proceeds of the accounts he had collected or might thereafter collect. The Receiver filed an affidavit in opposition to the petition and the matter was thereupon referred to the Referee as Special Master.

Testimony was taken, over Burden's objection, as to the negotiations preceding the execution of the agreement of December 14 for the purpose of showing that the parties intended to make a usurious contract. The Special Master and District Judge both held that the agreement was usurious and an order was entered denying the prayer of Burden's petition and directing that Burden re-assign to the Receiver all the accounts assigned as aforesaid to him by the bankrupt.

Thereupon Burden took this appeal.

John J. Crawford, for the Appellant.

J. B. Engel, for the Appellee.

COXE, J.:

The appellant contends that no testimony should have been taken showing that the parties intended to enter into a usurious contract because the same contradicted the agreement of December 14 actually executed. We think that such testimony was admissible. The purpose of the usury law is to protect borrowers whose distress exposes them to be imposed upon. The debtor is always allowed to make this defense, notwithstanding that he thereby contradicts a written instrument, and so are his privies. *Knickerbocker Insurance Co. v. Nelson*, 78 N. Y., 50; *Wilmarth v. Heine*, 137 App. Div., 528; *In re Kellogg*, 121 F. R., 333; *Mudgett v. Coler*, 18 Hun., 302; *Rohan v. Hansen*, 11 Cush., 44; 27 Am. & Eng. Cyc. of Law, 2d Ed., 540; *Mercantile Trust Co. v. Gimbernat*, 134 App. Div., 410.

We need not inquire into the jurisdiction of the court or the power of the Receiver, because Burden instituted the reclamation proceedings and invited the court to pass upon his rights, to which the Receiver assented, *Bryan v. Bernheimer*, 181 U. S., 188; *Whitney v. Weinman*, 198 U. S., 539, 552.

Upon the merits, though the question of fact is an exceedingly close one, the majority of the court is not persuaded that the Receiver (now Trustee) has proved his contention, for the following reasons:

First. The instrument being perfectly valid upon its face, and the taking of usury being a crime, the burden was strongly upon the trustee to prove his contention in that regard.

If the testimony be evenly balanced or doubtful, Burden is entitled to recover.

Second. The usurious nature of the loan is sworn to by Canfield and one witness and denied by Burden and one witness. As to

number and character of the witnesses, there is no preponderance in favor of the trustee.

We think of no valid argument for giving greater credence to Canfield and Herzog than to Burden and Koehler.

Third. The advertisement in the paper by Burden contemplated just such an arrangement as the written agreement indicates. What he desired was employment and in order to secure it he was willing to lend from ten to twenty thousand dollars at the current rate of interest.

Fourth. The examination of the books and accounts which Burden agreed to make would take five or six days a month and for it he was entitled to some compensation.

If the holding of the District Court be correct, he was to do this work without any compensation whatever. It is hardly to be credited that Burden would consent to lend his money for the legal rate and do all this clerical work for nothing.

Fifth. The testimony that Burden volunteered the statement, that the contract of December 14th was intended to avoid the usury laws, to the only person who could take advantage of those laws seems incredible.

Canfield was asked what he said to Burden regarding the clause relating to services to be rendered, and he answered:

"I asked Mr. Burden just what he meant by that clause; why, he said that that was simply to get around the usury law; there were no services to be rendered at all; there were no services rendered."

Of course bankruptcy was not contemplated at that time, at least by Burden. If Canfield did not enforce the usury law Burden had nothing to fear. If the agreement did not bind Canfield, it did not bind anyone and yet Burden, if this testimony be true, made it absolutely useless to accomplish the object for which he says it was signed.

Why should Burden make an agreement to enable him to receive usurious interest and at the same time make it impossible for him to take such interest without placing him absolutely at the mercy of Canfield?

There is no pretense that Burden was non compos mentis at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words void for usury.

We must assume that Burden is a man of ordinary common-sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary and immediately send the "combination" to the burglar whom he had most reason to dread.

Sixth. There was nothing extraordinary in the endeavor of Burden to secure a place where he could obtain light work and be paid

a reasonable sum therefor, neither is there anything illegal or suspicious in the fact that in order to get such work he was willing to lend \$20,000.

Seventh. We are unable to accept the statement that Burden said that he would not render any services, or even that he contemplated such action. The bond made his rendering these services a condition and it is difficult to believe that he was so unintelligent as not to understand that failure to do what the bond required him to do would destroy an important security which he held against loss.

Eighth. The fact that Burden did little work is not of especial importance.

We are to test the contract as of the date of its inception and inquire what services he was required to do. If the business had run along for a year and he had complied with the condition he would have made examination of the books and assisted in making collections which would have taken a substantial amount of time and been worth a substantial compensation. The services were little because the failure came before the time of the first monthly "complete examination of books, accounts and vouchers."

The order of the District Court is reversed with costs.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 24th Day of February, One Thousand Nine Hundred and Twelve.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

In the Matter of ABRAM L. CANFIELD, Bankrupt; WILLIAM H. BURDEN, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

Endorsed: United States Circuit Court of Appeals, Second Circuit. In re A. L. Canfield. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Feb. 26, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ABRAM L. CANFIELD, Bankrupt.

Reclamation Proceedings of William H. Burden.

Clarence S. Houghton as Receiver in Bankruptcy of the assets of the above named Bankrupt, conceiving himself aggrieved by the decree made and entered herein on the 26th day of February 1912 does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors, as filed herein, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, March 7, 1912.

JACOB J. LAZAROE,
Attorney for Appellee.

Office & P. O. Address, No. 132 Nassau Street, Manhattan Borough, New York City.

The foregoing claim of appeal is allowed.

Dated New York, March 14, 1912.

ALFRED C. COXE, *U. S. J.*

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. In the Matter of Abram L. Canfield, Bankrupt, Petition for Appeal. Jacob J. Lazaroe, Attorney for Appellee. Office & P. O. Address, #132 Nassau Street, Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 14, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

In Bankruptcy. No. 14582.

In the Matter of ABRAM L. CANFIELD, Bankrupt.

Reclamation Proceedings of William H. Burden.

Assignment of Errors.

And now on this 11th day of March, 1912, comes Clarence S. Houghton, the Trustee in Bankruptcy and Receiver of the assets and effects of Abram L. Canfield, Bankrupt herein, by Jacob J. Lazaroe, his attorney, and says: that in the decree of the United States Circuit Court of Appeals for the Second Circuit, entered on the 26th day of February, 1912 reversing the final order of the District Court of the United States for the Southern District of New

York, entered on the 8th day of July, 1911 and resettled and reentered on the 13th of July, 1911, there is manifest error in this, to wit:

First. In that William H. Willis, the Special Master to whom these proceedings on petition therefor of William H. Burden, claimant had been referred to hear and take proof, having found as a fact and so reported to the United States District Court for the Southern District of New York, that William H. Burden aforementioned, was not employed in any bona fide way to render services to Abram L. Canfield, Bankrupt and that the arrangement as contained in the agreement so made by and between the said Burden and said Bankrupt by which said Burden was to receive one per cent per month on his advances "as compensation for the labor and services to be performed and time to be expended by him in making the examinations required by the terms of the bond executed by the Fidelity & Casualty Company of New York" was not made in good faith or with the intention that such percentage should be paid for such purpose, but that such arrangement was intended to be and in fact was devised to cover a scheme, that said Burden shall receive more than the legal rate of interest on his advanced to the Bankrupt, and such Finding of Fact having been affirmed by the United States District Court for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit was thereby precluded from reversing the final order thereon, entered, unless such Finding of Fact was clearly against the weight of evidence or clearly erroneous.

Second. That William H. Willis, the Special Master to whom this matter had been referred on petition therefor made by William H. Burden having found as a fact that the agreement forming the basis of the said Burden claim was usurious and wholly void, and having so reported to the United States District Court for the Southern District of New York, and thereon such Finding of Fact having been affirmed by said United States District Court the United States Circuit Court of Appeals for the Second Circuit, erred in not determining that such Finding as so affirmed became final and conclusive unless such Finding was clearly against the weight of evidence or clearly erroneous.

Third. That all the Findings of Fact made by William H. Willis the Special Master to whom the matters had been referred, as such, on the application therefor of William H. Burden, having been affirmed by the United States District Court, for the Southern District of New York, the final order entered thereon in the United States District Court, for the Southern District of New York on the 8th of July, 1911 and resettled and reentered on the 13th of July, 1911, should not have been reversed by the United States Circuit Court of Appeals, for the Second Circuit, unless such Findings of Fact were clearly erroneous or clearly against the weight of evidence.

Fourth. That William H. Willis, the Special Master to whom the matters herein had been referred, as such, on the petition therefor of William H. Burden, having made his Findings of Fact

thereon, and thereon made his report to the United States District Court for the Southern District of New York, and such Findings of Fact and report having been affirmed by the United States District Court, for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit, erred in not determining that such Findings of Fact became forever conclusive on the parties, unless such Findings of Fact were clearly against the weight of evidence or clearly erroneous.

Fifth. That the United States Circuit Court of Appeals for the Second Circuit erred in determining that the taking of usury being a crime, the burden was strongly upon the Trustee to prove his contention in that regard.

Sixth. That the United States Circuit Court of Appeals for the Second Circuit, erred in determining that the usurious nature of the loan was sworn to by Canfield and one witness and denied by Burden and one witness, and that as to number and character of the witnesses there is no preponderance in favor of the Trustee.

Seventh. That the United States Circuit Court of Appeals for the Second Circuit, erred in determining that the advertisement in the paper by Burden contemplated just such an arrangement as the written agreement indicated.

Eighth. That the United States Circuit Court of Appeals for the Second Circuit erred in determining that the examination of the books of account which Burden agreed to make would take five or six days a month and that for it he was entitled to some compensation.

Ninth. That the United States Circuit Court of Appeals for the Second Circuit erred in determining that the testimony "that Burden volunteered the statement that the contract of December 14, was intended to avoid the usury Law to the only person who could take advantage of those Laws, seems incredible."

Tenth. That the United States Circuit Court of Appeals for the Second Circuit erred in determining that the Trustee herein had not proved his contention that the agreement made between Burden and the Bankrupt was a cover for usury.

Eleventh. That the United States Circuit Court of Appeals for the Second Circuit erred in determining that the preponderance of evidence in this proceeding was not in favor of sustaining the Findings of Fact made by William H. Willis, the Special Master herein, as affirmed by the United States District Court, for the Southern District of New York.

Twelfth. That the United States Circuit Court of Appeals for the Second Circuit erred in determining that the final order of the District Court of the United States for the Southern District of New York, entered herein on the 8th of July, 1911 and resettled and reentered on the 13th of July 1911 was not based on a preponderance of evidence in support thereof.

Thirteenth. That William H. Willis, the Special Master to whom the matters herein had been referred upon the petition therefor of William H. Burden, having found that the transactions therein were void for usury, and such Finding of Fact having been affirmed

by a Judge of the United States District Court for the Southern District of New York and a final order thereon having been entered on the 8th of July, 1911, the United States Circuit Court of Appeals, for the Second Circuit, had no jurisdiction to reverse said final order on the facts, unless such Findings of Fact or final order thereon was clearly erroneous or clearly against the weight of evidence.

Fourteenth. That as all the Findings of Fact made by Hon. William H. Willis the Special Master to whom the matters herein had been referred, upon the petition therefor of William H. Burden, are supported by the testimony and evidence in the record, and such Findings of Fact having been affirmed by the United States District Court for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit erred in determining that the preponderance of evidence was equal or against the aforesaid Findings of Fact.

Fifteenth. That the United States Circuit Court of Appeals for the Second Circuit erred in reversing the final order entered herein in the United States District Court for the Southern District of New York on the 8th of July, 1911, and resettled and reentered on the 13th of July, 1911.

Sixteenth. That the United States Circuit Court of Appeals for the Second Circuit having found that the Court below had not committed any errors of Law, said Court of Appeals erred in not affirming the final order entered herein in the United States District Court, for the Southern District of New York, on the 8th of July, 1911 and resettled and reentered on the 13th of July, 1911.

Seventeenth. That the United States Circuit Court of Appeals for the Second Circuit, erred in finding that there was no preponderance of evidence in favor of the Trustee.

Nineteenth. That the United States Circuit Court of Appeals for the Second Circuit erred in finding that the witnesses Burden and Kohler, were entitled to more credence than the witnesses Canfield and Herzog.

Twentieth. That the United States Circuit Court of Appeals for the Second Circuit erred in refusing to determine that the final order entered in the United States District Court, for the Southern District of New York, on the 8th of July, 1911 and resettled and reentered on the 13th of July, 1911 should be affirmed.

Wherefore the said Clarence S. Houghton as Receiver of the assets of the above named Bankrupt, prays that the decree of the Said United States Circuit Court of Appeals for the Second Circuit be reversed.

JACOB J. LAZAROE,
Attorney for Applicant.

Office and P. O. Address: No. 132 Nassau Street, Manhattan Borough, New York City.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. In the Matter of Abram L. Canfield, Bankrupt. (Reclamation Proceedings of William H. Burden.) Assignment of Errors. Jacob B. Lazaroe, Attorney for Appellant. Office & P. O.

Address No. 132 Nassau Str., Manhattan Borough, New York City.
Presented March 14, 1912. Alfred C. Coxey, U. S. J. United States
Circuit Court of Appeals, Second Circuit. Filed Mar. 14, 1912.
William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ABRAM L. CANFIELD, Bankrupt.

Reclamation Proceedings of William H. Burden.

Whereas heretofore and on or about the 26th day of February, 1912, a decree was made and entered herein, and

Whereas, Clarence S. Houghton as Receiver in Bankruptcy of the assets of Abram L. Canfield, bankrupt, feeling himself aggrieved thereby intends to appeal therefrom to the Supreme Court of the United States.

Now therefore, the Illinois Surety Company a corporation organized and existing under the laws of the State of Illinois and having an office and place of business at No. 5 Nassau Street, in the Borough of Manhattan, City and State of New York, does hereby undertake in the sum of One Thousand Dollars (\$1000.00) that the said Clarence S. Houghton as Receiver in Bankruptcy as aforesaid shall prosecute an appeal to effect and answer all costs and damages if he fail to make his plea good.

Dated New York, March 11th, 1912.

ILLINOIS SURETY COMPANY,
By J. ELIHU ROOT KUNZMANN,
[SEAL.] *Attorney-in-Fact.*

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On the 11th day of March, 1912, before me personally came J. Elihu Root Kunzmann to me known, who, being duly sworn, did depose and say that he resides in the City of New York; that he is an attorney-in-fact of the Illinois Surety Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal attached to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided by law.

Sworn to before me the day and year first above written.

[SEAL.]

HERMAN GEILER,
*Notary Public, Commissioner of Deeds for the
City of New York, Residing in the Borough
of Manhattan.*

Power of Attorney from Illinois Surety Company to D. Clinton Mackey, Hulbert T. E. Beardsley, and J. Elihu Root Kunzmann, or Any of Them.

Know All Men by these Presents: That the Illinois Surety Company, a corporation duly incorporated under the laws of the State of Illinois, and duly authorized to act as sole surety, in pursuance of the following resolution, which was passed by the Board of Directors of the Company at a meeting held March 25, A. D. 1907, to-wit:

"Resolved, that the President, Vice-President or an Acting-President is hereby authorized, empowered and directed to make and appoint such agents and to execute such Powers of Attorney to accept process for and on behalf of this Company, or to authorize the said attorneys and agents to execute Bonds, undertakings or writings obligatory in the nature thereof, for and on behalf of this Company, as shall be needful, and to the same extent and effect as though said appointments were severally made by separate action of the Board of Directors in each instance, and the Secretary or Assistant Secretary is hereby authorized, empowered and directed to authenticate such appointments, affixing the corporate seal of the Company to the same."

has made, constituted and appointed, and by these presents doth make, constitute and appoint D. Clinton Mackey, Hulbert T. E. Beardsley and J. Elihu Root Kunzmann, of the City, County and State of New York, or any of them, its true and lawful attorneys-in-fact, with full power and authority to sign, seal, acknowledge and deliver in its name, place and stead, as surety, Bonds, undertakings or writings obligatory in the nature thereof, and when such Bonds, undertakings or writings obligatory are signed by the said D. Clinton Mackey, Hulbert T. E. Beardsley and J. Elihu Root Kunzmann, or any of them, as attorneys-in-fact, to bind the Company as fully and to the same extent as if said Bonds, undertakings or writings obligatory in the nature thereof, were executed by the Executive Officers of this Company at its Home Office in the City of Chicago, State of Illinois, and the Company hereby ratifies and confirms all that its said attorneys-in-fact may do or lawfully cause to be done in the premises by virtue of these presents.

In Witness Whereof, the Illinois Surety Company has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereunto affixed this twenty-fourth day of January, A. D. 1912.

[SEAL.]

ILLINOIS SURETY COMPANY,
By A. J. HOPKINS, *President.*

Attest:

CHAS. E. SCHICK,
[SEAL.] *Secretary.*

I, J. Howard Cahill, Assistant Secretary of the Illinois Surety Company, hereby certify that the above Power of Attorney is a true copy of the original records of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this twenty-fourth day of January, A. D. 1912, at the City of Chicago, State of Illinois.

[SEAL.]

J. HOWARD CAHILL,
Assistant Secretary.

*Statement of Financial Condition of Illinois Surety Company at the
Close of Business, December 31, 1911.*

Assets.

Bonds	8432,249.41
Cash in Office and Depositories	60,651.85
Premiums in Course of Collection	134,823.18
Accrued Interest	6,467.10
Bills Receivable	3,082.31
Advance on Contracts	23,672.25
Suspense	462.52
Miscellaneous Accounts Receivable	1,111.32
Due from Excise Committee	36,704.71
	<hr/>
	8699,224.45

Liabilities.

Capital Stock	8250,000.00
Surplus	50,000.00
Undivided Profits	122,028.89
Collateral Deposits	7,814.98
Reserve for Losses and Contingencies	53,800.39
Reserve for Re-Insurance	175,447.84
Accrued Taxes	948.23
Due for Re-Insurance	9,120.92
Commissions Accrued not due	30,287.42
	<hr/>
	8699,224.45

CITY AND COUNTY OF NEW YORK.

State of New York, ss:

I, J. Elihu Root Kunzmann, Attorney-in-fact of the Illinois Surety Company, do hereby certify that the foregoing is a true and correct copy of the statement of assets and liabilities of the said Company at the close of business, December 31, 1911.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this 11th day of March, 1912.

[SEAL.]

J. ELIHU ROOT KUNZMANN,
Attorney-in-fact.

Subscribed and Sworn to before me this 11th day of March 1912.

HERMAN GEILER,
Notary Public, Commissioner of Deeds for the
City of New York, Residing in the Borough
of Manhattan.

The within bond is approved as to form.

BRUSH & CRAWFORD,
Attys for W. H. Burden.

(Endorsed:) Copy. U. S. Circuit Court of Appeals for the Second District. In the Matter of Abram L. Canfield, Bankrupt. Reclamation Proceedings of William H. Burden. I approve of the within bond and of the sufficiency of the surety. This bond to act as a supersedeas. Alfred C. Cox U. S. J. March 14, 1912. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 14, 1912. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 185 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the Matter of Abram L. Canfield, Bankrupt, (Reclamation proceeding of William H. Burden) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of March in the year of our Lord One Thousand Nine Hundred and twelve and of the Independence of the said United States the One Hundred and Thirty-sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, Clerk.

UNITED STATES OF AMERICA, ss:

William H. Burden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 13th day of April 1912, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein Clarence S. Houghton as Receiver in Bankruptcy of the assets and effects of Abram L. Canfield Bankrupt is Appellant, and William H. Burden is Appellee to show cause if any there be, why the decree in said appeal mentioned shall not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward D. White, Chief Justice of the

United States, this 14th day of March in the year of our Lord One Thousand Nine Hundred and Twelve and of the Independence of the United States, the One Hundred and Thirty-sixth.

ALFRED C. COXE,
*Judge of the United States Circuit Court of
Appeals for the Second Circuit.*

Service of a copy of within citation is hereby admitted.
Dated N. Y. March 15, 1912.

BRUSH & CRAWFORD,
Attorney- for Wm. H. Burden, Claimant, Appellee.

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. In the matter of Abram L. Canfield, Bankrupt. Citation. Jacob J. Lazaro, Attorney for Appellant, Office & P. O. Address. 132 Nassau Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1912. William Parkin, Clerk.

Endorsed on cover: File No. 23,111. U. S. Circuit Court Appeals, 2d Circuit. Term No. 1035. Clarence S. Houghton, as receiver in bankruptcy of the assets and effects of Abram L. Canfield, bankrupt, appellant, vs. William H. Burden. Filed March 22d, 1912. File No. 23,111.



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SUPREME COURT OF THE UNITED STATES.

CLARENCE S. HOUGHTON as Receiver in Bankruptcy of the assets and effects of Abram L. Canfield, bankrupt,

Appellant,

against

WILLIAM H. BURDEN,

Appellee.

October Term 1912.

No. 591.

BRIEF FOR APPELLANT.

Statement.

This is an appeal by the Receiver, now the trustee in bankruptcy of Abram L. Canfield, a bankrupt from a mandate of the Circuit Court of Appeals for the Second Circuit which reversed the order and mandate of the United States District Court, for the Southern District of New York, confirming the report of the Special Master, to whom the matter had been referred to hear and report his conclusions thereon.

The facts in this matter are as follows:

Canfield was engaged in business in the City of New York. Some time in December, 1910, one Kohler, acting as broker or go-between arranged between Canfield and Burden, the appellee herein, for a loan by the appellee to said Canfield of \$10,000, for the use of which it was agreed between

the appellee and Canfield, that \$1,800 was to be paid as interest, that is to say, six per cent. per annum for the use of the money, and one per cent. per month as long as Canfield used the money (fols. 356, 258, pp. 87 and 119).

Shortly thereafter a contract was prepared by Burden's attorneys purporting to cover the transaction (fols. 55-63, pp. 19-21), by the terms of which Canfield was to receive sums of money from Burden and Canfield agreeing to pay six per cent. per annum and one per cent. per month; as security for the repayment of the sum so loaned to Canfield, Canfield assigned certain book accounts to Burden aggregating about \$14,000.

The agreement provided that the one per cent. per month charged in addition to the six per cent. per annum by Burden was to be for services rendered by Burden.

Thereafter, and subsequent to the making of the said loan and assignment of accounts, as aforesaid, Canfield was petitioned into bankruptcy. The then Receiver, and now Trustee appellant herein, contested the right of Burden, the appellee, to collect the accounts or to repayment of the money on the ground that the transaction between the bankrupt and Burden, appellee, was usurious and void, and that the agreement was merely a subterfuge and drawn in the form in which it appears in the record, for the purpose of evading the Usury Law of the State of New York.

On January 26, 1911, the appellee made and filed with the United States District Court, for the Southern District of New York his petition, in which he alleged that he was the owner of certain outstanding accounts which he alleged had been theretofore assigned to him by Canfield, and

was the owner of various sums of money which had been collected out of such moneys by the Receiver, and prayed the Court for an order directing the Receiver to pay over to him such moneys so collected.

The Receiver opposed the granting of such an order upon the ground that the written contract was merely a subterfuge and cover; that the real contract between the parties, to wit, the appellee and the bankrupt was usurious and void and that the appellee exacted for the loan of \$10,000, interest at the rate of eighteen per cent. (18%) per annum.

This contract was made in the City of New York, State of New York, and was, pursuant to the contention of the Receiver, the appellant herein, void under the "General Business Law" upon the ground of usury.

The "General Business Law" of the State of New York, Sections 370 and 373, read as follows:

"Sect. 370.—*Rate of Interest.* The rate of interest upon a loan or forbearance of any money * * * shall be \$6 upon \$100, for one year and at that rate for a greater or less sum, or for a longer or shorter time."

"Sect. 373.—*Usury Contracts Void.* All * * * contracts whatsoever * * * whereupon or whereby there shall be reserved or taken or secured or agreed to be reserved or taken any greater sum or greater value for the loan or forbearance of any money, goods or other things in action, than as above prescribed, shall be void."

Upon the hearing on the petition, the matter was by consent of the parties referred to Hon. William H. Willis, as Special Master, to hear and

report the evidence and his findings thereon, who after a full hearing made his report and findings to the effect that the transaction between the Appellee and the bankrupt was usurious and that under the laws of the State of New York, wherein said loan and agreement were made, the appellee forfeited the principal (fols. 43-129; pp. 15-43).

At the hearing before the Special Master, the bankrupt and his bookkeeper testified positively with respect to the real transaction between Canfield and the appellee and that the written contract was made as a cover to avoid the Usury Laws of the State of New York (fols. 252-262, 267-268, 280-284; pp. 84-87, 89, 90, 94, 95). As against this testimony, the appellee denied the testimony of the bankrupt and his bookkeeper. The broker, Kohler, attempted to deny the testimony offered on behalf of the appellant, but in many instances corroborated the testimony offered on behalf of the appellant (fols. 355-357; p. 119).

The report and findings of the Special Master were thereafter on motion duly confirmed by Hon. Learned Hand, one of the Judges of the United States District Court, for the Southern District of New York (fols. 433-453, 454-456; pp. 145-154).

From the order of the United States District Court, the appellee herein appealed to the Circuit Court of Appeals for the Second Circuit on Assignment of Errors contained in the record.

The learned Circuit Court sustained the Special Master and District Court on the law but reversed the order of the District Court on the facts (pp. 167-169).

From the order of the Circuit Court, the Receiver, upon Assignment of Errors duly filed an appeal to this Court. In all, there are twenty assignment of errors (pp. 170-173).

Assignment of Errors.

The appellant relies upon the following as errors committed by the Circuit Court of Appeals for the Second Circuit.

First. That William H. Willis, the Special Master, to whom these proceedings on petition therefor of William H. Burden, claimant, had been referred to hear and take proof, having found as a fact and so reported to the United States District Court for the Southern District of New York, that William H. Burden, aforementioned, was not employed in any *bona fide* way to render services to Abram L. Canfield, bankrupt, and that the arrangement as contained in the agreement so made by and between the said Burden and said bankrupt, by which said Burden was to receive one per cent. per month on his advances "as compensation for labor and services to be performed and time to be expended by him in making the examinations, required by the terms of the bond executed by the Fidelity & Casualty Co., of New York" was not made in good faith or with the intention that such percentage should be paid for such purpose, but that such arrangement was intended to be and in fact was devised, to cover a scheme that said Burden shall receive more than the legal rate of interest on his advances to the bankrupt, and said finding of fact having been affirmed by the United States District Court for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit was thereby precluded from reversing the final order thereon entered, unless such finding of fact was clearly against the weight of evidence, or clearly erroneous.

Second. That William H. Willis, the Special Master to whom this matter had been referred on petition therefor made by William H. Burden, having found as a fact that the agreement forming the basis of the said Burden claim was usurious and wholly void, and having so reported to the United States District Court for the Southern District of New York, and thereon such finding of fact having been affirmed by said United States District Court, the United States Circuit Court of Appeals, for the Second Circuit, erred in not determining that such finding as so affirmed became final and conclusive, unless such finding was clearly against the weight of evidence, or clearly erroneous.

Fourth. That William H. Willis, the Special Master to whom the matters herein had been referred, as such, on the petition therefor of William H. Burden, having made his findings of fact thereon, and thereon made his report to the United States District Court, for the Southern District of New York, and such findings of fact and report having been affirmed by the United State District Court for the Southern District of New York, the United States Circuit Court of Appeals, for the Second Circuit, erred in not determining that such findings became forever conclusive on the parties unless such findings of fact were clearly against the weight of evidence, or clearly erroneous.

Tenth. That the United States Circuit Court of Appeals for the Second Circuit, erred in determining that the Trustee herein had not proved his contention that the agreement made between Burden and the bankrupt was a cover for usury.

Eleventh. That the United States Circuit Court

of Appeals for the Second Circuit erred in determining that the preponderance of evidence in this proceeding was not in favor of sustaining the findings of fact made by William H. Willis, the Special Master herein, as affirmed by the United States District Court for the Southern District of New York.

Thirteenth. That William H. Willis, the Special Master to whom the matters herein had been referred, upon the petition therefor of William H. Burden, having found that the transactions therein were void, for usury, and such finding of fact having been affirmed by a Judge of the United States District Court, for the Southern District of New York, and a final order thereon having been entered on the 8th of July, 1911, the United States Circuit Court of Appeals for the Second Circuit had no jurisdiction to reverse said final order on the facts, unless such findings of fact or final order thereon, was clearly erroneous, or clearly against the weight of evidence.

Fifteenth. That the United States Circuit Court of Appeals for the Second Circuit erred in reversing the final order entered herein in the United States District Court for the Southern District of New York on the 8th of July, 1911, and resettled and re-entered on the 13th of July, 1911.

Sixteenth. That the United States Circuit Court of Appeals for the Second Circuit having found that the Court below had not committed any errors of law, said Court of Appeals erred in not affirming the final order entered herein in the United States District Court for the Southern District of New York on the 8th of July, 1911.

ARGUMENT.**I.**

The United States Circuit Court of Appeals for the Second Circuit having found that the Court below had not committed any errors of law, said Court of Appeals erred in not affirming the final order entered herein in the United States District Court for the Southern District of New York.

In determining the questions involved on this appeal, the learned Circuit Court of Appeals did not find any errors of law to have been committed in the Court below but reversed the judgment for the reason that a majority of that learned Court was not persuaded that this appellant had proved his contention (Opinion of the Court, p. 167).

The first error of the learned Court below which we beg to present to this Court, is, that under the provisions of Section 566 of the Revised Statutes as interpreted and defined by this Court, the facts found by the Special Master and confirmed by the District Judge were conclusive on the learned Circuit Court of Appeals.

Section 566 of the Revised Statutes provides as follows:

"The trial of issues of fact in the District Court in all cases, except cases in equity and cases in admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury."

In construing this statute this Court has laid down the rule that the trial by a District Judge without a jury of any causes not excepted by the foregoing statute is in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the Court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding, was not a judicial determination, and therefore not subject to re-examination in an Appellate Court.

Campbell v. United States, 224 U. S., 99.

Rogers v. United States, 141 U. S., 548.

Campbell v. Boyreau, 21 How., 223.

Campbell v. U. S., 224 U. S., 99. This was an action at law against the sureties on the official bond of a Receiver of public moneys to recover for a default of their principal. The action was begun in the District Court and was tried by the Court without a jury. A judgment was entered for the defendants.

The plaintiff took the case on writ of error to the Circuit Court of Appeals, which held that the facts found were insufficient to support the judgment and reversed the latter with a direction to enter a judgment for the plaintiff upon the finding. The defendant then sued out a writ of error to this Court.

Mr. Justice VanDevanter, delivering the opinion of the Court, at page 195:

"At the outset we are confronted with the question of the power of the Circuit Court of Appeals to consider the sufficiency of the facts found to support the judgment."

"Section 566, Revised Statutes, provides that the trial of issues of fact in the District Courts in all cases except in equity and cases

of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy should be by jury. This was not one of the excepted cases. * * * In this state of the Statute Law, the trial in the District Court, without a jury was in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the Court's determination of the issue of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination, and therefore not subject to re-examination in an Appellate Court. (*Campbell v. Boyreau*, 21 How., 223; *Rogers v. United States*, 141 U. S., 548.) It follows that the Circuit Court of Appeals was without power to consider the sufficiency of the facts found to support the judgment."

The case at bar clearly comes within this ruling unless first, the matter involved constitutes an action in equity and not in law, or second, if specifically excepted by the provisions of the Bankruptcy Act.

The appellee instituted this controversy by a petition to the District Court in which he alleged that he was the owner of certain accounts receivable of the face value of \$14,291.14. That this appellant, then Receiver, now trustee in bankruptcy had collected on such accounts from the persons owing same sums aggregating over one thousand dollars, all of which was his property; his prayer for relief is an order directing the Receiver to pay over to him all of such moneys so collected (fols. 1 to 23, pp. 1 to 8).

Manifestly, if the appellant had commenced an action on the facts recited in his petition as he had a right to do, his only remedy would be an action at law for trover or conversion. Under no

circumstances appearing in this record did his cause of action lie in equity; had the appellee attempted to frame his complaint in equity, he would have been defeated under the laws of the State of New York by the plea that he had an adequate remedy at law.

Bradley v. Aldrich, 40 N. Y., 510.

It being demonstrated that the remedy of the appellee lay in the law part of the Court the next question is, is it one of the causes excepted in "proceedings in bankruptcy."

This Court has already decided that a matter of the kind at bar is not a proceeding in bankruptcy, hence the exception made by provisions, Section 566 of the Revised Statutes, do not apply to this case.

Courts of Bankruptcy it has been held are given jurisdiction to try matters in controversy.

The mode of trial of such matters is specifically regulated by the Bankruptcy Act.

Section 19, Subdivision C of the Bankruptcy Act provides as follows:

"C. The right to submit matters in controversy or alleged offense under this act to a jury should be determined and enjoyed, except as provided by this Act, according to the United States law now in force, or such as may be hereafter enacted in relation to trials by jury."

This provision of the act clearly relates to the provisions of the Revised Statutes regulating trials by a jury.

Speaking of this Act the Circuit Court of Appeals, Second Circuit, says:

"In the present act (Sec. 19, Clause C),

where the matters in controversy are of legal as distinguished from equitable cognizance, the right of the parties to a trial by jury is expressly preserved."

In re Baudoine, 101 Fed. Rep., 574.

In re Russell, 101 Fed. Rep., 248.

In the matter at bar the appellant had the option of commencing suit either in a United States or State Courts to recover the moneys collected by the Receiver. He elected to proceed by intervening in the bankruptcy proceedings, thus creating a controversy in a bankruptcy proceeding which has been defined as those independent or plenary suits which concern the bankrupt's estate.

Knapp v. Milwaukee Trust Co., 206 U. S., 553.

In re Mueller, 135 Fed. Rep., 711.

In re Farrell, 176 Fed. Rep., 505.

But the suit or matter in controversy retains its character of legal or equitable cognizance according to the nature of the controversy involved and as the case at bar rests in law it was triable in the District Court by a jury and not having been so tried it was in the nature of a submission to an arbitrator and not the mode of trial contemplated by law.

Campbell v. United States (*supra*).

II.

The Special Master having found certain facts which were confirmed by the United States District Court, the Circuit Court of Appeals should not have reversed the judgment and order entered thereon unless the findings of fact were clearly erroneous or clearly against the weight of evidence.

When a tribunal finds a certain state of facts not at first hand, but on the report of a Master appointed merely to take evidence, the Appellate Court has equal, in fact greater facility to spell out the truth in the case from a perusal of the testimony, for the reason that its consideration thereof is aided and illumined by the argument on the evidence of the Court below; but the manifest advantages possessed by a tribunal that hears and sees the witnesses that testify to a conflicting state of facts to glean and determine the truth in the litigation, has been so well recognized by this Court as to lead it to lay down the rule that while the finding of a Master to hear and report the evidence is not absolutely conclusive if there be no testimony to support it, but so far as it depends upon conflicting testimony or upon the credibility of a witness, or so far as there is any testimony consistent with the findings, it must be treated as conclusive.

Davis *v.* Schwartz, 155 U. S., 631.

Kimberly *v.* Arns, 129 U. S., 512.

Davis v. Schwartz (*supra*):

This was a matter that was sent to a Special Master to hear and report the testimony. In discussing the consideration to be given the report and findings of fact by the Special Master, Mr. Justice Brown, writing for the Court at page 636, says:

"As the case was referred by the Court to a Master to report, not the evidence merely, but the facts of the case and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact is attended by a presumption of correctness similar to the case of a finding by a Referee, the special verdict of a jury, the findings of a Circuit Court, in a case tried by the Court under Revised Statutes, Sec. 649, or in an admiralty case appealed to this Court. In neither of these cases is the finding absolutely conclusive as if there be no testimony to support it, but so far as it depends upon conflicting testimony or upon the credibility of a witness or so far as there is any testimony consistent with the finding it must be treated as unassailable."

See also opinion of Mr. Justice Lurton in *Ohio Valley Bank v. Mack*, 163 Fed. Rep., 155.

We respectfully submit that the rule above enunciated applies with peculiar force to the matter at bar.

The facts in dispute between the parties were, by consent of all concerned, referred by the District Court to a Special Master to hear and take the testimony and report his opinion thereon, and on the law, to the District Court.

The Special Master heard all the testimony, saw and heard all the witnesses and his report

to the District Court evidences a most careful and exhaustive discussion thereof (fols. 43 to 129, Pr. Rec., pp. 15 to 43); he had full scope and opportunity to gauge the credibility to be given the various witnesses, his integrity or impartiality is not impugned, the testimony is conflicting and every finding of fact is supported by and consistent with the evidence before him and his findings should not have been disturbed.

The findings of the Special Master were carefully reviewed and confirmed by the learned District Judge in an opinion contained in this record (fols. 433-453, pp. 145-151).

III.

The preponderance of evidence was in favor of sustaining the findings of the Master.

The learned Circuit Court of Appeals has overruled the findings of fact made by the Master and confirmed by the learned District Judge, preferring to lend credence to the evidence of Burden and Kohler to that of Canfield and Hess.

Under the statute of the State of New York, the taking or agreeing to take interest on the loan of money at a rate greater than six per cent. per annum makes the transaction usurious and illegal and void; numerous schemes are resorted to to hide and conceal or give a seeming legality to a transaction which in reality is usurious.

In the cause at bar the transaction took the guise of an apparently open and legal transaction; under the written agreement between Canfield and Burden (fols. 55-64, pp. 19-22); the latter was to

lend the former \$10,000 on the security of outstanding accounts on which he was to receive six per cent. per annum; Burden was also to do some work for which he was to be compensated at the rate of one per cent. per month on the amount loaned.

That Burden agreed to and did obtain more than six per cent. per annum is thus beyond doubt.

The only question open is, did he obtain such greater sum as interest or as compensation for services rendered? If the latter the transaction is valid, if the former it is void.

Burden denies that there was any usury contemplated in the transaction; in this the broker Kohler attempts to corroborate his principal, Burden.

Canfield and his Secretary, Mrs. Hess, testify distinctly and unequivocally, that the transaction was usurious, that the arrangement was that Burden was to get six per cent. per annum and one per cent. per month on the amount advanced; that the written agreement was but a cloak to hide the transaction (fols. 252 to 262, pp. 85 to 86; fols. 267-268, pp. 89-90; fols. 280-284, pp. 94-95).

Passing the question of the interest of any of these witnesses in the outcome of the litigation, we respectfully submit that there is a feature in the case, a consideration of which will show what was the real transaction and that is, was Canfield in search of an additional employee in his business or was he seeking the use of money? Was Burden seeking a means of making money through employment or was he seeking to make money on an investment of money?

That Canfield was seeking for an employee is not pretended; that he was seeking for money is

conceded and established beyond doubt; Burden says that he was seeking for employment, light employment and that the loan of money by him was but an incident to his main purpose; if that be so why was his labor restricted only to the collateral he was getting on the loans? Why were there no discussions between the parties for work generally in Canfield's business? Why was the amount to be paid to Burden fixed at one per cent. per month on the amount to be loaned by him?

There are undoubtedly cases where men honestly seek employment and are willing, to attain their end, to lend money to their employers; but in all such cases the employment is the main end, the employment is general in the business of the employer; only when some ulterior purpose is sought to be accomplished, under an honest appearance, is an agreement of the kind at bar resorted to; under the theory of the appellee a note shaver has but to lend a bulk sum to one person on a hundred or more promissory notes to legalize a charge of six per cent. per annum and one per cent. per month on the amount loaned (fols. 376-377, p. 126).

The language of Mr. Justice Allen of the New York Court of Appeals may well be applied to the case at bar.

"The sole question is, whether the transaction was a *bona fide* sale of the bonds at an exorbitant rate, or a loan of money under guise and color of sale of choses in action by which the lender reserved or secured to himself a greater rate of interest than that allowed by law. The transaction must be judged by its real character rather than by the form and color which the parties have seen fit to give it.

The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise but none have been allowed to prevail. The Courts have been astute in getting at the true intent of the parties and giving effect to the statutes."

Quackenbos v. Sayers, 62 N. Y., 345.

That the real motive moving the parties was the giving and taking of an usurious rate of interest and not of an employment is abundantly evidenced by the testimony of Kohler.

This witness on cross examination testified as follows:

"Q. But there was some conversation between Mr. Burden and yourself and Mr. Canfield in relation to the extra 1%?

A. I told Mr. Canfield that it would cost him that much money.

Q. And were you the first party that told Mr. Canfield that?

A. I was.

Q. Now, what led up to the discussion of the 1% with Mr. Canfield?

A. Why, naturally Mr. Canfield wanted to know what it was going to cost him; he paid more money on previous loans.

Q. Never mind about previous loans. About this loan, what led up to your telling Mr. Canfield he would have to pay the extra 1%?

A. What led up to the facts? I told him the conditions on which the arrangement could be made with Burden.

Q. What were those?

A. That it would cost him on \$10,000, \$1,800 a year.

Q. Did you explain how it would cost him that?

A. No, I told him that is what it would cost him.

Q. Without explaining the details?

A. No.

Q. Now, who told you, or what led you to make that statement to Mr. Canfield?

A. Because Mr. Canfield wanted to know what it was going to cost him always when I made a loan for him.

Q. Did you make that statement on your own initiative or because of your talk with Mr. Burden?

A. Certainly, Mr. Burden told me what it was going to cost before I told Mr. Canfield, otherwise I would not have known it" (fols. 355-357, p. 119).

It must be apparent from this testimony that the questions discussed between Canfield, Burden and Kohler were not the employment of Burden or compensation for such employment but the loan of \$10,000 and the cost of such loan per annum to Canfield.

We will not discuss the evidence further though there are many other features therein referred to and discussed by the Master, amongst others the explanation by Burden that the reason that the compensation for labor was fixed at one per cent. per month on the amount advanced was "because the work to be performed depended almost entirely on the number of accounts and the amount of them" (fol. 376, p. 126), which stamp this transaction as utterly illegal and void.

IV.

No errors of law having been committed in the Trial Court its order and mandate should be confirmed.

We believe that all the assignments of error have been discussed under the preceding points and we will end our brief by a short discussion of the law of usury in the State of New York.

Parol testimony can be introduced for the purpose of showing the real transaction between the parties and showing that the agreement, as drawn, was a mere subterfuge and made with the purpose and intent of evading the usury laws.

By a weight of authorities and from the authorities cited below it is not only apparent that parol evidence was properly admitted, but that appellee's claim was properly rejected.

Two very recent cases are:

Mercantile Trust Co. v. Ginbernatt, 134 App. Div., 410.

Willmarth v. Hine, 137 App. Div., 528 N. Y.

Also:

Knickerbocker Life Insurance Co. v. Nelson, 7 Abb. N. C. (N. Y.), 180, citing *DeWolf v. Johnston*, 10 Wheat., 385.

Vilas v. McBride, 62 Hun (N. Y.), 324.

And this is the law throughout the country.

Massa v. Dauling, 2 Str., 1243.

Scott v. Lloyd, 9 Pet. (U. S.), 418.

Tucker v. Wilamonicz, 8 Ark., 157.

Train v. Collins, 2 Pick. (Mass.), 145.

Denyse v. Crawford, 18 N. J. L., 325.

Grayson v. Brooks, 64 Miss., 410.

It must be borne in mind that in no instance could usury be shown where the parties had drawn a contract of the character in the case at bar unless parol testimony could be introduced to show the real arrangement, as well as the collateral agreement entered into between the parties showing their true relations.

The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent it was usurious.

Kohler v. Dodge, 31 Neb., 238, 47 N. W. Rep., 913.

Rowan v. Hanson, 11 Cush., 44.

Take the ordinary promissory note which is a contract or instrument to pay a certain sum of money for a consideration or for value received as therein expressed. The note itself is the written and binding obligation between the parties, and it has been repeatedly held that oral testimony could be introduced to show the relations between the parties and the agreement made with respect to the payment of usurious interest, even though the note on its face contained a provision for the payment of legal interest.

Roe v. Kiser, 62 Ark., 92; 34 S. W. Rep., 534.

McAleese v. Goodwin, 32 U. S. App., 650; 69 Fed. Rep., 759.

In all instances of this character, as well as in the case at bar the instrument is innocent and

valid on its face and it is only by resort to extrinsic facts and circumstances that it is invested with the element of illegality.

A contract may not necessarily be usurious on its face; the burden is on the one contesting it upon the ground of usury to prove the guilty intention and that the contract was a cover for usury and for the loan of money upon usurious interest (*Rosenstein v. Fox*, 150 N. Y., 304, and cases cited).

On these questions oral, extrinsic and circumstantial evidence is freely received.

Thomas v. Murray, 32 N. Y., 605.

Valentine v. Conner, 40 N. Y., 248.

V.

The order of the Circuit Court appealed from should be reversed and the order and judgment of the District Court affirmed.

Respectfully submitted,

JACOB B. ENGEL,
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JACOB JNO. LAZAROW,
Attorney for Appellant.

[1973]

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JAN 8 1913

JAN 8 1913

JAMES M. McKENNEY,
Clerk

Supreme Court of the United States

OCTOBER TERM, 1912,

No. 591.

CLARENCE B. HOUGHTON, as Receiver in Bankruptcy of
the Assets and Effects of Abram L. Canfield, Bankrupt,
Appellant,

against

WILLIAM H. BURDEN,

Appellee.

BRIEF FOR APPELLEE.

Appeal from the United States Circuit Court of Appeals
for the Second Circuit.

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Supreme Court of the United States,

CLARENCE S. HOUGHTON, AS RE-
CEIVER IN BANKRUPTCY OF THE
ASSETS AND EFFECTS OF ABRAM
L. CANFIELD, BANKRUPT,
Appellant,

vs.

WILLIAM H. BURDEN,
Appellee.

October Term
1912.

No. 591.

BRIEF FOR APPELLEE.

Statement.

This is an appeal by a receiver in bankruptcy from a decree of the Circuit Court of Appeals for the Second Circuit, reversing an order of the District Court for the Southern District of New York. The proceeding is of the sort commonly called a reclamation proceeding, and was instituted by William H. Burden, the appellee here, and appellant below, to procure an order directing the receiver of Abram L. Canfield, a bankrupt, to pay over certain moneys collected by the receiver on accounts which the bankrupt had assigned to the appellee. The matter was referred

to a special master who reported that the accounts were assigned in pursuance of an agreement which was wholly void for usury, and that they were the property of the bankrupt's estate; and this report was confirmed by the District Court. The order of confirmation was reversed by the Circuit Court of Appeals. The order of reversal does not show whether the reversal was upon the law, or upon the facts, or upon both (Record, p. 169).

Upon the hearing before the Master the following facts were established by evidence which is undisputed. In the month of April, 1910, Burden, who is conceded to be an expert book-keeper and accountant of large experience (fols. 377-379), published in the New York Herald an advertisement in this form:

Retired merchant, not desiring partnership, will loan established rated party \$10,000-\$20,000 (6%), same carrying responsible position. B., 139 Herald, Downtown.

(fols. 311-312; 328, 324). This advertisement was answered by a Mr. Arthur J. Kohler (fol. 311), and at a meeting which resulted the appellee told Koehler that he would lend from \$10,000 to \$20,000 in some good business, if he were given a position in that business which would pay him at least \$50 a week (fol. 324). Koehler then saw the bankrupt and told him that he had a man who would lend the bankrupt \$10,000 upon security, if given a position at a salary of \$50.00 a week, in the way of "looking after the accounts and credits, and work pertaining to that particular line." The bankrupt replied that "he could use a good man," and thereupon Koehler arranged

for a conference between the bankrupt and Burden (fol. 312). This conference, however, resulted in no immediate arrangement, because the financial statement submitted by the bankrupt was about a year old, while Burden wished a statement of later date (fols. 314-316). Some five or six weeks later the matter was taken up again (fol. 347). Koehler had told Burden about a form of bond which the Fidelity & Casualty Company was issuing (fol. 316), and Burden, after examining this form of bond at the office of the company, told Koehler that probably some arrangement could be made with the bankrupt, if the latter would pay for the services which that bond would require (fols. 349-350), and would submit a statement of recent date. These matters were then arranged, and on the 14th of December, 1910, Burden and the bankrupt entered into a contract in writing by the terms of which they agreed as follows: The bankrupt was to assign to Burden approved accounts due from reputable debtors, and Burden was to pay therefor seventy-five per cent. of their face value. These accounts were to be for goods which had been accepted by the debtors, and which had been shipped from certain designated factories; and the original shipping receipts or invoices were to be submitted to Burden for his inspection at the time of the assignment. The collection of the accounts, however, was left with the bankrupt, who was to act as the agent of Burden in that respect. If any account should not be paid within ten days after falling due, the bankrupt was to pay the amount thereof to Burden, who was thereupon to re-assign the account; and in case of the failure of the bankrupt to make such

payment, Burden had the right, at his election, to revoke the agency of the bankrupt to collect any of the accounts then uncollected. By its terms, the contract was to apply to all purchases of accounts by Burden from the bankrupt. In addition to the above stipulations, the contract contained the following:

“VIII.—The party of the second part [Burden] shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent. per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected.”

“IX.—When the amount collected on said accounts and turned over to the party of the second part shall amount to the total sum advanced thereon, with interest at the rate of six per cent. per annum, and the party of the second part shall have received out of said collections his compensation for services as above mentioned, and all disbursements made or liabilities incurred, for exchange, or for attorneys' fees, or other expenses in and about the collection of said accounts, he shall reassign to the party of the first part all accounts then uncollected.”

The bond mentioned in the contract (fol. 406-423) was conditioned to indemnify Burden (1) if any of the assigned accounts should be fictitious, or (2) if the bankrupt should fail to pay over any part of the collections. By the express terms of the bond, the contract between the bank-

rupt and Burden was made a part thereof, and it was expressly stipulated, as a condition of the liability of the Surety Company (1) that Burden should enforce all the provisions of his contract with the bankrupt; (2) that he should require the bankrupt to state in writing at the time of assigning each account the date when the payment of such account would be due; (3) that if the payment of any account should not be made within twenty days after such date, he should thereupon immediately make demand upon the debtor by registered mail; (4) that he should require the bankrupt to file with him in connection with each account, a certificate signed by a responsible employee stating that the account referred to in the certificate represented a *bona fide* sale, and that the merchandise had been shipped to the customer; (5) that he should at least monthly make an examination of the accounts of the bankrupt which should embrace (a) a complete examination of the books, accounts and vouchers of the bankrupt respecting the accounts assigned, and (b) a strict comparison between all unpaid accounts as such accounts should appear on Burden's records and as they should appear in the books of original entry of the bankrupt.

In pursuance of the contract, the bankrupt, on the 16th of December, 1910, assigned to Burden 98 different accounts amounting in the aggregate to \$13,334.34, and Burden paid him \$10,000. therefor (fols. 159-168; 426). On the 5th and 13th of January, 1911, the bankrupt assigned to Burden 109 other accounts aggregating \$14,291.14, (which are the accounts involved in the proceeding) and received therefor three checks amounting in all to \$10,628.60 (fols. 10-22; 137-139; 426).

Two of these checks, amounting together to \$8,628.60, he indorsed over to Burden, who thereupon re-assigned to him all the uncollected accounts included in the assignment of December 16th (fols. 160-426). The accounts so re-assigned amounted to \$11,847.06; Burden having collected only \$1,487.28 (165-167).

As to the matters so far mentioned, there was no contest and no conflict in the evidence. The dispute consists wholly as to what was said prior to the execution of the writing. The bankrupt, who was called as a witness by the receiver, was examined by counsel for the receiver concerning certain conversations which the bankrupt stated took place between him and Burden at the time of the execution of the written contract, and over the objection of Burden that all the negotiations of the parties were merged in the writing, and that the writing spoke for itself, this witness was allowed to testify that when the written agreement was submitted to him by Burden he asked Burden what was meant by the clause in reference to services, and that the latter replied "that that was simply to get around the usury law; there were no services to be performed at all" (fols. 257-258, 266-269). One of the subscribing witnesses—Miss Hess, who afterwards became Mrs. Herzog—was then called as a witness on behalf of the receiver, and over like objection and exception, was allowed to testify to conversations which she said took place between the bankrupt and Burden before the agreement was signed, and among other things was permitted to testify that she heard Burden say that the one per cent. was "to cover the bonus and usury charge" (fols. 279-280, 282-286).

Burden was then called on his own behalf, and denied that any such conversations occurred (fols. 363-366), and in this he was corroborated by Kohler, the other subscribing witness to the agreement (fols. 317-322). The referee and the District Judge credited the story so told by the witnesses for the receiver, and upon that testimony found that the contract was usurious and void.

I.

As the record does not show that the Circuit Court of Appeals passed upon the weight or preponderance of the evidence, the appellant cannot be heard to allege that the Court committed any error in that regard.

Of the twenty assignments of error filed by the appellant, eighteen refer to alleged errors respecting the weight of evidence, and two, the fifteenth and twentieth, are merely general statements that the court erred in reversing the order of the District Court and in not affirming that order (Record, pp. 170-173). Now, as respects the weight of evidence, there is nothing in the record to show that the Circuit Court of Appeals passed upon any such question, and these eighteen assignments are aimed at nothing except statements and arguments found in the opinion. But, as said by the Supreme Court of Illinois, the court reviews the judgment of the lower court, not its opinion. (*Kehl v. Abram*, 210 Ill. 218, 223).

Furthermore, this court has repeatedly held that the opinion is no part of the record. In *Williams v. Norris*, (12 Wheat. 117, 119-120), Chief Justice Marshall said: "It [the opinion] can be introduced for no other purpose than to suggest to the Superior Court those arguments which might otherwise escape its notice, which operated in producing the judgment, and which, in the opinion of the legislature, ought to be weighed by the Superior Court, before that judgment should be reversed or affirmed. If the judgment should be correct, although the reasoning by which the mind of the judge was conducted to it should be deemed unsound, that judgment would certainly be affirmed in the Superior Court." And the Chief Justice added the further observation, that the opinion could have no other influence on the cause than it would have if published in a book of reports. (See also *Rector v. Ashley*, 6 Wall. 142, 148).

So, in *England v. Gebhardt* (112 U. S. 502) the court said:

"Neither is the opinion of the court a part of the record. Our Rule 8, Sec. 2, requires a copy of any opinion that is filed in a case to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below." (See also *Saltonstall v. Birtwell*, 150 U. S. 417, 419; *Stone v. United States*, 164 U. S. 380, 382.)

It is true that after the passage of the Act of February 5th, 1867, the Court departed from the former rule so far as to look into the opinion to learn whether a Federal question was raised below. (*Murdock v. City of Memphis*, 20 Wall. 590, 633; *McManus v. O'Sullivan*, 91 U. S. 578; *Gross*

v. United States Mortgage Co., 108 U. S. 477). But it is obvious that this practice was adopted for reasons peculiar to that class of cases, since it is not always practicable to have the record show that a right or immunity under the constitution or laws of the United States was claimed and decided, and sometimes this can be made to appear only by evidence outside of the record; and from the necessity of the case, the court looks to the opinion, just as it sometimes receives a certificate from the state court. (See *Murdock v. City of Memphis*, 20 Wall. 590, 633).

But to allow the opinion to be used for this purpose is quite different from allowing it to be used as a basis for assigning errors. When the question is merely this—Was a certain contention made and passed upon? the opinion will furnish satisfactory evidence thereof. But when the question is—Has the court below committed any error for which the judgment or decree should be reversed? then the opinion cannot be conclusive; for though the higher court might not concur in anything said in that opinion, it might still find the decree or judgment to be correct. Besides, how would the case stand if, as often happens, there should be several opinions? Would the assignment of errors be aimed at one of them or at all of them?

That errors may not be assigned upon the opinion of the court from which the case is brought up is well established in the practice of the State Courts. For example, in Illinois, where the Appellate Courts—which are intermediate courts of appeal corresponding to the Circuit Courts of Appeal in the Federal system—are required by statute to briefly state in writing the reasons for their decisions, the Supreme Court of the State

has said: "To say that error can be assigned upon that writing seems little less than absurd. Those courts are required to pass upon questions of fact, but they are not required to state in their opinions that such duty has been performed, nor by what process of reasoning they reach their conclusions. * * * What the court below may have assigned as reasons for its decision can in no way affect the correctness of the judgment, however instructive it may be in ascertaining the points upon which the case was considered and decided in that court." (*Pennsylvania Company v. Verstein*, 140 Ill., 637, 640; 15 L. R. A. 798.) So, in a recent case the Court of Appeals of New York said: "While we require the opinions written to be printed and made a part of the record, they do not form a part of the judgment roll. We do not, therefore, look to the opinions for the purpose of determining the contents of an order, finding, or judgment, or its meaning. We only examine the opinions for the purpose of ascertaining the arguments made and the reasons given in support of the rulings and determinations made by the court whose order or judgment is under review" (*Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y. 520, 526).

If any proof were required of the unsuitableness of the opinion as a support for the assignment of errors, we have to look no further than the assignments filed in this case. The sixth, seventh, eighth and ninth go only to "the process of reasoning employed by the Circuit Court of Appeals" (see *Randall v. N. Y. Elevated R. R. Co.*, 149 N. Y., 211, 213) and though they might be perfectly good, the decision of the court might still be correct.

In *Loeb v. Columbia Township Trustees* (179 U. S., 472, 485) this court, after deciding that the opinion of the Circuit Court "may be examined in order to ascertain whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States," was careful to add: "*By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.*"

Now, certainly in the present case, it would have been quite feasible to have had the record show the points decided by the Circuit Court of Appeals. Indeed, the appellant had only to follow the state practice, and have inserted in the order of reversal a recital showing whether the reversal was upon the law, or upon the facts, or upon both. (*Van Tassell v. Wood*, 76 N. Y., 614; *Townsend v. Bell*, 167 N. Y., 462, 467-469.) Then he would have had something against which he could properly direct his assignments of error. But as he has not caused it to appear by the order of reversal, or otherwise in the record, that the Circuit Court of Appeals passed upon the weight or preponderance of the evidence, he is in no position to say that the court committed error in that regard. Hence, the eighteen assignments in which errors of this character are set out present no question for review.

II.

The fifteenth and twentieth assignments are too general and indefinite to require notice.

As to the other two assignments of error, the fifteenth and the twentieth, while they refer to the record, they certainly do not set out with "particularity" the error asserted. To say that the Circuit Court of Appeals erred in reversing the order of the District Court, and in not affirming that order, points to no contention which the court might not infer from the mere fact that the appeal was taken. And as the order of the Circuit Court of Appeals does not show whether the reversal was upon the facts or upon the law, the court could discover the alleged error only by reading the entire record, and examining all the evidence and all the rulings. A plainer case of a failure to comply with the rule could hardly be imagined. In this respect, the case is like *Fidelity & Deposit Co. v. Anderson* (102 Ga., 551). There the cause involved questions both of law and fact, and was tried before the court without a jury. The assignment of error was a general one, not specifying how or wherein the trial judge erred in his judgment, whether as to matter of law or as to matter of fact. It was held that the assignment of error was too general to be considered, and the writ of error was dismissed. (See also *Lytle v. Prescott*, 57 Minn. 129).

In *Deutsch v. Wiggin* (15 Wall, 239, 246), the Court said: "That rule [No. 35] is necessary to the disposition of the business which presses upon us, and it is our intention hereafter to en-

force strict compliance with its demands. If errors are not assigned in the manner required, the assignments will be treated as if not made at all". (See also *Deering Harvester Co. v. Kelly*, 103 Fed. Rep. 261; *Flickinger v. First Nat. Bank*, 145 Fed. Rep. 162). Now, certainly these observations are quite as pertinent to-day as then. And while this court may sometimes notice a plain error of *law* not assigned, there can be no good reason why, in the absence of a proper assignment of error, it should read through all the evidence to discover whether the facts have been correctly decided.

III.

As the jurisdiction in this case exists solely by virtue of the bankruptcy act, which confers upon this court full power to make all rules respecting procedure, the court should adopt the same practice as that which it has established for "proceedings in bankruptcy" and should refuse to review the facts.

But assuming that the assignment of errors is sufficient, should this court undertake to review the facts? If this were a "proceeding in bankruptcy", the decision of the Circuit Court of Appeals upon the facts would be conclusive. (General Order XXXVI). But is there any reason

why a different practice should prevail merely because the appeal is in "a controversy arising in bankruptcy proceedings"? In the determination of this question, we are first to note the source of the jurisdiction. The parties are not, so far as the record shows, citizens of different states; nor is the construction of any Federal statute involved, but merely the application of a statute of New York; and the jurisdiction depends wholly upon the fact that one of the parties is a receiver in bankruptcy. The Bankruptcy Act, then, is the only source of jurisdiction.

Now, that act contains this provision; "All necessary rules, forms and orders as to procedure * * * * and for carrying this act into effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." (Sec. 30). In pursuance of the power so conferred this court has promulgated a rule that in bankruptcy proceeding the court from which the appeal is taken must make findings of fact, which are conclusive here. (General Order XXXVI.) While this rule applies only to "proceedings in bankruptcy" the power of the court to regulate the mode of procedure is not limited to that particular class of proceedings. The words of the statute are "All necessary rules * * * as to procedure." This language is general and comprehensive, and fairly embraces the procedure applicable to any proceeding which originates in a court of bankruptcy. Nor is it important that the court has not yet adopted a rule by which the findings of the Circuit Court of Appeals are made conclusive in a "controversy arising in bankruptcy proceedings"; for as the court has power to prescribe *all* rules of proce-

ture, it is not material whether the power is exercised by promulgating formal rules, or by making rulings from time to time as occasion may require.

Now, having full power to prescribe a rule of practice which will limit the review in this class of cases to questions of law, why should the court not exercise that power? Certainly, public convenience will be served thereby. For what could be more absurd than that suitors who have questions of greatest moment to submit to the court should have to wait while the court, in a trivial case, and where the Federal jurisdiction is merely accidental, performs the most ordinary function of a common jury, namely, decides a question of veracity between witnesses?

That such a duty should be imposed upon the court even where the amount involved is ten thousand dollars, seems quite proposterous. But with this case as a precedent, where would the matter end? Receivers and trustees in bankruptcy have many controversies with third persons respecting the title to property claimed to be a part of the bankrupt's estate, and in most of these the issue of fact is as sharply contested as in the present case. Now, shall this court have to decide such an issue whenever either party sees fit to bring it here? When we recall that the jurisdictional amount is only one thousand dollars, we can easily see what consequences must follow. Trivial disputes, involving only questions of veracity between witnesses, would clog the docket, and seriously impede the proper business of the court. Certainly a practice which would result in such public inconvenience should be discouraged.

Indeed, the notion that a court of last resort should be called upon to review the facts in any case is fast becoming obsolete. In many of the States, as for example in New York, the highest court has been entirely relieved of this duty (See New York Code of Civil Procedure, §191). So, in England there seems to be a growing sentiment against a review of the facts in the House of Lords (See remarks of Lord Davey in *Montgomerie v. Wallace*, L. R. A. C. [1904] 73, 83). And now in that country, the Court of Appeal will not allow an appeal to the House of Lords in a bankruptcy case upon a question of fact. (*Ex parte Miles*, L. R. 2 Q. B. Div. 39, 47; *In re Lake*, K. B. Div. [1901] 710, 719; *Ex parte Hyman*, L. R. 8 Ch. Div. 11, 26). This practice would seem to furnish a just analogy for the procedure to be adopted by this court in "controversies arising in bankruptcy proceedings."

IV.

The point that the Circuit Court of Appeals had no power to reverse upon the facts is not well taken; but if this point is good, then the case should have been brought here by a writ of error, and the appeal should be dismissed.

There seems to be some inconsistency in the brief of the appellant in that by his assignment

of error his contention is that the Circuit Court of Appeals could not reverse, unless the decision of the special master as affirmed by the District Judge, was clearly against the weight of evidence, whereas in his first point he seems to contend that the Circuit Court of Appeals could not review the facts at all.

Now, even if the latter contention be conceded, how does it help the appellant? There is nothing in the decree of the Circuit Court of Appeals to show that the reversal was upon the facts; but for all that appears, the reversal might be upon some question of law. And even though we refer to the opinion to learn what the ground was, the mere circumstance that the court discussed only the question of fact is not sufficient reason for saying that it found no error of law. If the appellant desired to make this point, he should have had the decree show that the reversal was solely upon the facts, if indeed, such was the case.

Upon the present state of the record his contention, if conceded, places him in a position where he has nothing to argue. For he cannot point to anything in the record which shows that the Circuit Court of Appeals found all the questions of law in his favor; and since he says that that court could not review the facts, he must concede that his assignments of error, which have reference only to the weight of evidence, present no question for argument here; for very plainly if the Court of Appeals may not review the facts, neither may this court.

But assuming that the record shows that the circuit court of appeals reversed solely upon the facts, its power to do so cannot well be questioned

at this day. The case was a proceeding by intervention in the bankruptcy court, and it is well settled that in such a proceeding the case may be taken to the circuit court of appeals by *an appeal* (*Hewitt v. Berlin Machine Works*, 194 U. S. 296) ; and an appeal "opens both fact and law." (*Duryea Power Co. v. Sternbergh*, 218 U. S. 299 302).

That *Campbell v. United States* (224 U. S. 99) and the other cases cited on page 9 of the appellant's brief have no application to the present case is perfectly plain, since they were taken up by writs of error. But concede that they apply, and what is the result? In that event, the proper procedure for bringing the case here would be a writ of error, and the appeal must be dismissed.

V.

All of the testimony upon which the appellant relies to sustain his contention is incompetent and should be disregarded.

As the whole record is before the court, the appellee may sustain the decree of the Circuit Court of Appeals upon any tenable ground, and is not limited to the grounds stated in the opinion. (*Ward v. Hasbrouck*, 169 N. Y. 407). Now, the finding that the contract was usurious was based wholly upon testimony which the appellee, when it was received, objected to as incompetent, and which, he has maintained throughout the whole

proceeding, ought not to be considered at all. If, therefore, this objection is good, the appellant's contention fails.

The evidence relied upon by the appellant consists of the testimony of two witnesses—one of them a party, and the other a witness, to the written agreement—who testified to certain oral statements which they said they heard the appellee make before the writing was signed. One of these witnesses, the bankrupt himself, testified that when the appellee showed him the written agreement he asked the appellee what was meant by the clause relating to pay for services, and that the appellee replied “that that was simply to get around the usury law; that there were to be no services rendered at all.” (fols. 257-258; 266-269). And one of the subscribing witnesses—a Miss Hess, who afterwards became Mrs. Herzog—testified that she heard the appellee say that the one per cent. was “to cover the bonus and usury charge” (Fols. 279-280; 282-286). All this testimony was taken over the objection of the appellee that the negotiations of the parties were merged in the written contract, and that the writing spoke for itself. (fols. 257-258; 266-267; 279-280).

Now, when the agreement was made it was manifest that in connection with the advances, the appellee would be required to perform certain services, which, as said by the District Judge, would be “undeniably substantial and vexations” (fols. 440-441); and the appellee had a legal right to stipulate that he should be paid for these services, in addition to the interest on the money advanced. (*Thurston v. Cornell*, 38 N. Y., 281; *Matthews v. Coe*, 70 N. Y., 237; *Bennett v. Gins-*

berg, 141 App. Div., 66). He then entered into a written contract which contains an express statement that certain sums shall be paid to him as compensation for such services. Now, what should be deemed evidence of the contract that he intended to make? The explicit language of the written agreement? or testimony of the parties and subscribing witnesses as to what was said at the time?

It will be noticed that the testimony was not introduced to explain or apply the language used in the written instrument, or to establish an entire agreement of which the written contract was only a part; but to strike out of the writing terms that the parties had written in, and insert other terms; and this for the purpose of destroying the contract by substituting for a condition which was perfectly lawful a condition which was unlawful. If this may be done, then the result must be this, that a man who has made a written contract, in which he has stipulated for money to be paid to him for a lawful purpose, may have his contract struck down, whenever persons can be found to swear that before the contract was signed he stated orally that he did not intend that the payment should be made for the lawful purpose stated in the writing, but for a different and unlawful purpose.

A case presenting a plainer infraction of the rule excluding parol evidence could hardly be imagined. One of the parties to a written contract explicit in its terms and complete upon its face, was called to testify to oral declarations of the other party, which tended to contradict the express language of the writing, and which were made before the execution thereof, and a person

who had placed her signature upon the paper as a subscribing witness was called to corroborate this testimony. This party and this subscribing witness were then flatly contradicted by the other party and by the other subscribing witness, so that what was received as evidence of the agreement, was not the writing which had been so signed and witnessed, but the recollection of the parties and the subscribing witnesses; and the courts instead of referring to the formally executed paper to ascertain the intention of the parties, have attempted to settle the question of veracity between them. If such a thing was ever done before, the case has not got into the reports.

Of course, people should not be allowed to circumvent the statute against usury. But anxiety to enforce that antiquated enactment—an anxiety certainly never displayed by the Courts of the State (See *Re Samuel Wildes' Sons*, 133 Fed. Rep. 365)—should not impel this Court to adopt a rule which would enable dishonest persons to make a wrongful use of that statute, and place honest lenders at the mercy of rascally borrowers. With the decision in this case as a precedent, what lender would be safe, if the written contract should provide for any payments at all, except for principal and interest? If this rule is to prevail, then wherever a draft drawn for a certain sum with six per cent. interest contains a provision for the payment of exchange, the acceptor may escape payment by calling witnesses willing to swear that when the draft was signed the drawer declared that the provision for exchange was intended for "the usury." (See *Marvins v. Hymers*, 12 N. Y., 223). So, whenever a lawyer, putting out his own money on bond

and mortgage, stipulates for the payment of his fees for examining the title, the security may be avoided, if the mortgagor can produce persons to testify that when the contract for the loan was made, the lender stated that the provision for the expenses of such examination was intended "to get around the usury law." So, whenever the written agreement for a loan contains a stipulation for paying the expenses of the borrower in examining the property, or for making a survey, or for insurance, or for like trouble or expense, the borrower may get rid of his obligation if he can only find persons to swear that at the time the writing was executed the lender stated orally that this was intended as a "bonus". So, in the same way, whenever a factor enters into a written contract under which he stipulates for interest on his advances, and also for commissions on the sales, the shipper may destroy the contract by swearing to an alleged oral declaration of the factor that the commissions were for the "usury." (See *Matthews v. Coe*, 70 N. Y., 239).

Contracts such as these are of daily occurrence; in fact, nearly all contracts for loans upon real estate, or for advances upon any security, except bonds or stocks or commercial paper, provide for the payment of something besides interest, and if, in such cases, witnesses are permitted, as said by the Court of Appeals of New York (*Lossing v. Cushman*, 195 N. Y., 386, 390), "to swear out of the contract something that the parties have written in, and to swear into the contract something that the parties have not written in," what security does the writing afford to the lender, no matter how innocent he may be? Such a rule, as said in the case just cited, "would leave

no contract safe, and the most prudent person could not erect a barrier against misunderstanding, forgetfulness or *perjury*."

Again, if evidence of this character may be introduced for the purpose of showing that the contract was usurious, why may it not be used to invalidate contracts upon other grounds? Why may it not be used in any case where either party can make a plausible claim that the other party had an illegal intent? For equally good reasons, a lease may be destroyed by oral testimony which will substitute an illegal condition for one of the valid conditions set out in the instrument. So, a contract to buy or sell something that may be lawfully dealt in, might be destroyed by testimony that the other party said before the contract was executed that it was intended to cover articles which the law did not permit to be sold.

In his opinion, the District Judge said: "I regard *Scott v. Lord* (9 Peters, 418, 446), as controlling." (fol. 435). But a reference to that case will disclose that it is no authority for the admission of such evidence as was received in this case. There the instrument before the court granted a ground rent, and contained a covenant for a re-conveyance by the grantee, upon the payment of \$5,000, and an adjustment of the rents; and the point decided was that the Court was not bound by what appeared upon the instrument alone, but might look to all the surrounding circumstances. There was no attempt to impeach the instrument itself; but every word of the writing was given full force and effect. In fact, nothing more was done in that case than is done in the ordinary case where a grantor is allowed to show that a deed absolute in form was intended

as security for a loan, or that a sale with a right of re-purchase was intended as a mortgage.

There seems to be no reason why the competency of this evidence is not a question of general law to be decided by this court according to its own views. But if the question is to be deemed one of local law, *Potter v. Tallmann* (35 Barb. 183) appears to be directly in point, and there being no decision of the highest court of the State upon the question, should be accepted as controlling. That case was an action upon a certificate of deposit dated at the "Banking House of Tallman, Powers & McLean, Davenport, Iowa." The rate of interest mentioned in the instrument was ten per cent., and the defendants, having pleaded usury, sought to prove that the intention of the parties was that the money should be paid at Poughkeepsie, New York. But the court held that as this evidence would contradict the express terms of the writing, it was inadmissible. The Court said: "It suited the parties to put the contract in writing, and we are therefore to ascertain the place where the contract was made, the time when and the place where the money was payable, as well as the rate of interest, by reference to the contract itself. The primary object of resorting to a written instrument, in which to incorporate the stipulations of the agreement, was to avoid the uncertainty, the doubt and the insecurity of a contract resting merely in parol. Upon its face, it professes to have been made at Davenport, Iowa. This it does in plain and explicit terms. * * *

The offer of the defendants, which the judge rejected as illegal and inadmissible, was nothing else than an effort to vary and change the terms

of the written contract by parol evidence—to show the money was not to be repaid at Davenport, Iowa, where the contract plainly said it was to be repaid, but in Poughkeepsie, in the State of New York, where the certificate in as plain terms said it was not to be repaid, and thus bring it within the prohibition of the statute of usury of the latter state. A reference to some few authorities will show that parol evidence is not admissible for any such purpose.”

Nor does *Mudgett v. Goler* (18 Hun, 302), which is cited in the opinion of the Circuit Court of Appeals (record, p. 167) establish any different rule. That was a suit to foreclose a mortgage, which was collateral to a bond executed by the defendant for the payment of \$5,000, “with interest semi-annually.” The evidence which was held admissible was the testimony of the defendant that at the time of giving the bond and mortgage he had agreed to pay interest at ten per cent. per annum, *and had actually paid interest at that rate*. Now, this amounted to no more than showing facts in addition to those disclosed by the writing; in other words, the defendant was allowed to show the transaction in its entirety. But he was not permitted to testify to oral declarations of the mortgagee flatly contradicting the express language of the writing, and to substitute these oral declarations for the writing itself, as was done here.

If, in the present case, the written agreement had contained no mention of the additional one per cent., then the case would have been within the principle of *Scott v. Lord* (*supra*) and *Mudgett v. Goler* (*supra*), and parol evidence would have been admissible to show that, in addition to

what appeared upon the face of the writing, there was an agreement to pay this one per cent., and upon all the facts, both those shown by the writing and those proved by parol, the court would have been required to decide whether the transaction was usurious. When, however, the written agreement is complete, and discloses the entire transaction, there can be no necessity for resorting to parol evidence, but the court may decide the question of usury upon the writing itself. Of course, the court may, as in other cases, look to the state of facts to which the terms of the contract are applicable. For example, the court may look to the facts respecting the services to be rendered, and if those services appear to be merely trifling, may infer that the stipulation was intended as a cover for usury. But this is a very different thing from admitting parol declarations for the purpose of striking out of the contract a condition that is there and putting in a condition that is not there.

VI.

But even if the testimony as to the oral declarations of the appellee is deemed competent, the evidence was insufficient to meet the burden of proof.

If evidence of oral declarations inconsistent with the terms of the written agreement are to be received at all, then certainly the court should

at least proceed with caution in giving effect to them, especially where the only testimony as to those declarations is given by one of the parties and by one of the subscribing witnesses, and the other party and the other subscribing witness testify that nothing of the sort was said. To begin with, the burden of proof, as said by the Circuit Court of Appeals in its opinion, is strongly upon the Receiver.

In *White v. Benjamin* (138 N. Y. 623, 624) the Court of Appeals of New York said: "Usury is a crime, and he who alleges it as a defense to an obligation to pay money must establish it by clear and satisfactory evidence. He enters upon the defense with the presumption against the violation of the law, and in favor of the innocence of the party charged with the usury. He cannot properly claim to have the usury inferred where the evidence is inconclusive and just as consistent with the absence as with the presence of usury. It is a just requirement that all the facts constituting the usury should be proved *with reasonable certainty*, and that they shall not be established by mere surmise and conjecture, or by inferences entirely uncertain."

And in *Stillman v. Northrup*, (109 N. Y. 473, 478), Earl, J., said: "The defense of usury involving crime and forfeiture cannot be established by mere surmise and conjecture, or by inferences entirely uncertain. If, upon the whole case, the evidence is just as consistent with the absence as with the presence of usury, then the party alleging the usury has failed."

See also

Rosenstein v. Fox, 150 N. Y. 354.

Matthews v. Coe, 70 N. Y. 239, 243.

Re Samuel Wilde's Sons, 133 Fed. Rep. 562.
Klein v. Title Guaranty Co., 166 Fed. Rep.
365.

Under this rule, it is not sufficient for the Court to surmise or conjecture that the stipulation respecting compensation for the labor and services to be performed and time to be expended by the appellee was a cover for usury, but that this was so, must appear with reasonable certainty.

Now, whether or not the transaction was usurious depends upon Burden's intent. (*Thurston v. Cornell*, 38 N. Y. 281; *Davis v. Marvine*, 160 N. Y. 269). If the stipulation for compensation for his time and services was intended as a mere cover for illegal interest, there was usury, but if he actually intended just what he stipulated for, then there was no usury. To get a correct notion of his intent, we should begin with his advertisement which was the inception of the business. In that advertisement, he said, "Retired merchant, not desiring partnership, will loan established rated party \$10,000-\$20,000 (6%) same carrying responsible position." The motive behind this is quite plain. The advertiser wished to obtain a position, and to aid him in this effort, he offered to lend \$10,000 or \$20,000 at six per cent. His primary object was to get employment, and the offer of a loan was held out merely as an inducement to the other. And when he saw the broker who answered the advertisement, he stated that he would lend from \$10,000 to \$20,000 in some good business, "provided he should receive a position there that would pay him at least \$50 a week," (fols. 324; 326-327) and, as stated by the broker, "that was his idea all the time" (fols.

346-347). Then when the matter was first submitted to the bankrupt by the broker, and the bankrupt was informed that, as a part of the transaction, Burden would want a position in the business, the bankrupt said "he could use a good man" (fol. 312). So far, there is no conflict in the evidence; and while the evidence as to what else was said at the conference between the bankrupt and Burden is quite conflicting, the receiver's own witness, Herzog, testified that Burden told the bankrupt that "what he wanted to do was to have employment there". (fols. 296-297).

Up to this point, it is clear that it was not his purpose to put out his money at a high rate of interest, but merely to use the loan as a means of getting employment. Now, is there anything in the evidence to show that that purpose was changed? The plan with reference to a bond was suggested by the broker (fols. 316, 331-332), and Burden, having examined the form of bond that the Fidelity & Casualty Company was issuing in such cases, found that it required services to be performed in the line of his own profession as an accountant. On this point, the uncontradicted testimony of the broker is: "I said to Mr. Burden that provided the new statement was satisfactory to him, would he make some arrangement with Mr. Canfield provided Mr. Canfield would give a surety bond and Mr. Burden told me that the Fidelity & Casualty Co. bond provided for certain work and contingencies and it seemed to him a satisfactory way of concluding business with Mr. Canfield, and if the statement was satisfactory he would make some arrangement with him" (fols. 331-332).

Now, all this evidence bears out Burden's statement, when he testified, as he had a right to do

(*Davis v. Marvine*, 160 N. Y. 269, 274-277) that he intended to charge for his services exactly as stated in the agreement; that he had at no time any intention to charge more than six per cent for interest on his advances; that the stipulation was inserted in the agreement in perfect good faith, and was not intended as a subterfuge to cover usury (fols. 375-376).

That Burden had the right to exact pay for his time and services in addition to the interest on the money advanced is clear. (*Thurston v. Cornell*, 38 N. Y., 281; *Bennett v. Ginsburg*, 141 App. Div., 66; *Matthews v. Coe*, 70 N. Y., 237). And when we turn to the bond we find that the services which he would be required to perform were substantial, indeed, the District Judge himself concedes that they were "undeniably substantial and vexatious" (fols. 440-441). The bond, by its terms, made the contract a part thereof, and it required that Burden should *observe and enforce* all the provisions of the contract. One of these provisions was that the original shipping receipt or invoice should be submitted to Burden for his inspection at the time of the assignment; and very plainly, the bond, by implication, required him to make this inspection. Now, in each assignment there were a number of accounts most of which embraced several shipments. In the assignment of January 5th, there were 63 different accounts which embraced 225 different shipments (fol. 402); and in the assignment of January 13th there were 46 accounts embracing 239 shipments (fols. 10-23; 398-402). There were thus nearly 500 shipping receipts or invoices to be examined at the outset. But what was more important, Burden was required to make *a complete examination at least once a month*—and circumstances might have

rendered more frequent examinations necessary—of the books, accounts and vouchers of the bankrupt as respects the accounts assigned, and to make a strict comparison between all unpaid accounts as the same should appear on Burden's records, and as they should appear on the books of original entry of the bankrupt (fols. 414-416).

Now, it is obvious that this work would necessarily require some time. Burden—who is conceded to be an expert bookkeeper and accountant (fols. 378-379)—testified that when he made the contract, he estimated that these examinations would take from five to six days each month (fols. 369-375); and on this point, he is wholly uncontradicted, for the receiver and his counsel did not attempt to show, by cross-examination of the witness or otherwise, that the estimate was out of the way. This estimate, as explained by the witness, was based upon an assumed advance of \$10,000, so that his compensation, as fixed by the contract, would come to something less than \$20 a day, at the most. Now, is it at all unreasonable that an expert accountant and one who had been the president of a national bank (fol. 379), should stipulate for compensation for his time and services at such a figure? Most of us who have occasion to employ accountants would be glad to pay such a rate; for hardly ever do we escape for less than \$25 a day.

Besides, by taking this work upon himself, Burden had to forego all regular employment as office manager or accountant upon a salary—the thing he had been seeking—and like every other man engaging to do work which precludes him from doing other things, he had to consider this circumstance when stipulating for his compensation.

Furthermore, Burden, when he made the contract, had to assume, as he says he did (fols. 372-374), that some of the accounts might not be paid by the debtors, or taken up by the bankrupt, within the time mentioned in the bond, and that in such event, he would have to make demand upon the debtors by registered mail and assume the collection of the accounts, which very plainly would require much more labor and time.

Now, is it at all likely that any man would take upon himself all this labor and trouble merely for the privilege of lending his money? He might do that without going to any trouble at all, and upon much better security than assigned accounts. Would any one expect a lawyer, lending his own money on bond and mortgage, not to exact compensation for examining the title? But when the lender is an accountant, and the transaction involves labor on his part in the line of his profession, why should he be expected, any more than a lawyer, to give his services for nothing? When a lawyer, in the case mentioned, makes a contract by which he is to be compensated for examining the title, and the charge for this is not grossly excessive, no one thinks of saying that the transaction is suspicious. Why, then, should it be thought suspicious that an accountant, in a like case, stipulates that he shall be paid for examining bills of lading, books, vouchers and invoices?

Nor is it a suspicious circumstance that the compensation is to be measured by computing a percentage upon whatever part of the advance made by Burden should remain uncollected upon the accounts; for it is obvious that the amount of work must depend entirely upon the amount outstanding. If, for example, there were only \$1,000

outstanding, there would be only a few accounts involved, and the examination being limited to the entries, vouchers, etc. relative to these accounts only, would require a comparatively small amount of time and labor; while, if \$9,000 or \$10,000 was outstanding, there would be nine or ten times as many accounts to be looked after, and nine or ten times as much work to be done. This method of computing the compensation, therefore, was not only a natural one, but the fairest and most equitable that the parties could adopt. To take again the case above supposed, of a lawyer lending his own money on bond and mortgage, does he not fix the charge for examining the title by computing a percentage on the amount of the loan? But no one thinks that there is anything wrong about this. Yet the labor of examining a title may be just the same whether the loan is one thousand dollars or ten thousand dollars, while in the present case, the quantity of labor is accurately measured by the amount of the advance outstanding. And as this is the measure of the services to be performed, may it not reasonably and properly be made the measure of the compensation for those services?

If we are to say that the provision respecting compensation for services was only a cover for usury, we must resort to a number of assumptions. First, we must assume that the writing does not express the real intention of the parties. Then we must further assume that Burden intended to make the examinations for nothing, or to make no examinations at all. But why should we say that he meant to make no charge for something he had a right to charge for in order that he might charge for something for which he was for-

bidden to charge? And as to assuming that he did not intend to make the examination, why should we think that, after having required a bond, he meant to release the surety company from liability by failing to comply with the conditions on his part? Inferences of this sort would be unwarranted in any case, much less in a case where every presumption is in favor of the contract.

Upon the hearing, the receiver attempted to show that Burden rendered no services *to the bankrupt*. But how is this material? The examinations required by the terms of the bond were not designed for the benefit of the bankrupt, but for the protection of his surety. Nor does this fact affect the validity of the contract; for the usury law does not prevent a borrower from contracting to pay for services rendered to a third person.

Nor is it important that when the bankruptcy occurred, Burden had made only a partial examination of the books. The obvious reason of the surety company for requiring this examination was, among other things, to prevent embezzlement of the funds by the bankrupt; and for this purpose an examination made immediately after the assignment of accounts would be useless; but to accomplish the end desired, the examination must have been deferred until such time as it might be likely that the bankrupt would have made some collections. Now, the first lot of accounts assigned, having matured within two weeks, and being re-assigned to the bankrupt, there was no necessity for examining the books as to them; and as to the assignments of January 5th and 13th, which embrace the accounts in controversy, the time for

making the examination respecting them had not arrived when the petition in bankruptcy was filed on the 16th of January. But as none of these accounts would become payable until April 1st (fols. 10-23), Burden, except for the bankruptcy, in addition to examining the shipping receipts and invoices, which he did (fols. 368-369), would have been required at least once each month for several months, to make a complete examination of the books, accounts and vouchers of the bankrupt covering them. There is nothing, therefore, in the subsequent conduct of the parties to warrant the inference that the stipulation to pay for services was intended for any purpose except that declared in the contract.

We may next consider whether the testimony of the bankrupt and the subscribing witness Hess (or Herzog) is inherently probable. Now, to take first the statement of the bankrupt, that at their very first interview Burden stated his desire to become a partner, does this appear at all credible? There is scarcely anything about which business men are more careful than about entering into partnerships, and before they go into an arrangement which enables another man to pledge their credit, and to incur obligations for which they will be liable, they want to be thoroughly satisfied about many things besides the mere matter of the assets and liabilities of the business, and particularly do they want to know all about the personality of the man with whom they are to be so intimately associated, and whom they will have to trust so implicitly. A man of ordinary prudence would avoid a hasty alliance of this sort as much as he would avoid a hasty marriage. Is it at all likely, then, that Burden, on the very first

occasion that he met the bankrupt, and without knowing anything about his habits or his disposition, or his associations, would propose a partnership? A man would have to have a very different training from that of an accountant, to do anything so rash. Besides, the advertisement put in evidence by the receiver (fol. 424) shows that a partnership was the very thing Burden did not want. And with this idea so prominently in his mind, that he was impelled to state it in his advertisement, is it credible that he proposed, what no sensible man, even if he had not had his mind so fixed, would have thought of proposing?

The testimony of the bankrupt as to what was said by Burden when the contract was signed, as to the purpose of the provisions for compensation for services, is also incredible. His testimony on this point is that when the written contract was shown to him he asked Burden what this provision was for, and that Burden said that it was simply to get around the usury law, and that there were no services to be rendered (fols. 268-269). Now, if Burden had it in his head to circumvent the usury statute, would he not have kept that purpose concealed? If he had wit enough to devise such a scheme, he would have wit enough not to talk about it. If he had any plan of the sort, it was aimed against the bankrupt alone, and the bankrupt being the only person who could complain of it, would be the last person in the world to whom Burden would be likely to declare his purpose. Is it probable, that having taken the trouble to have his lawyer prepare a contract which would not violate the law, that he would go to the very man with whom he expected to make

that contract and say to him that notwithstanding it was apparently legal, it was in fact illegal? Would he thus voluntarily furnish a perfect defense to the very man he was seeking to bind? Besides, why should he have said that there were no services to be rendered, when he knew that the conditions of the bond demanded services? The testimony given by bankrupts is often a tax upon one's credulity, but rarely has one of them told a more improbable story than this.

Furthermore, it clearly appears that when the contract was made the bankrupt was obtaining Burden's money under a false pretense. The statement which he rendered to Burden, and which the latter had exacted as a condition of doing business, shows an indebtedness of only \$33,552.13 and a surplus of \$70,713.90, with a net gain for the year of \$5,100 (fols. 402-404). But his schedules disclose that only about six weeks later his indebtedness amounted to \$67,229.78 (fols. 427-431). Of course, it is possible that in this short interval his indebtedness had doubled. But there is no evidence to that effect, and certainly if this had been the fact it could have been easily established; and in the absence of proof the court may hardly presume that this was the case, especially when the bankrupt, having the opportunity to explain it, refused to do so, and when asked as to the truth of the statement, took refuge behind the plea that an answer to the question would tend to convict him of a crime (fols. 301-304).

It is true that Burden had a pecuniary interest in the result, but such an interest does not necessarily discredit him (*Hull v. Littauer*, 162 N. Y., 569, 572-573). Nothing in the evidence shows that

he is an untruthful man, while the bankrupt appeared before the court as a rascal, who had practiced a gross deception, and who stood in danger of a prosecution for larceny upon Burden's complaint (Penal Law [New York], Sec. 1290); and in such a situation, what is more natural than for the man confronted by proofs of his wrong-doing to cry *tu quoque*? To involve the injured party himself in a criminal liability (Penal Law [New York], Sec. 2400) is a favorite recourse of rogues in such a plight.

As to the evidence of the two subscribing witnesses, why should the court believe the witness Herzog rather than the witness Koehler? To say that the latter has an interest because he was the broker is merely fanciful. He had nothing to do with preparing the contract, and was in no way responsible for what the parties did. Besides, he had known the bankrupt for some time, and had done business for him before (fols. 356-357), while his acquaintance with Burden was but recent, and confined to this one piece of business. His testimony is consistent throughout, and his answers to all the questions put to him, whether upon the direct or cross-examination, are responsive, direct and in no way evasive. On the other hand, the witness Herzog had been associated with the bankrupt for fifteen years (fols. 277-278) and had acted for him in a confidential capacity (fols. 275-276), and that she should be under his influence is certainly much more likely than that Koehler should be under the influence of Burden. Besides, Koehler is corroborated by the statements in the writing itself, and the presumption that the writing does express the true intent of the parties is always a strong one. (*Nevins v. Dunlap*, 33 N. Y. 676, 680.)

In his opinion the District Judge says that the question resolves itself into a consideration of whether the compensation agreed upon was "clearly too much to pay for this work" (fols. 440-441). Now, surely, this can hardly be the true test. Is a man who has stipulated for compensation for his services in connection with a loan to forfeit his principal whenever a judge or jury shall be of opinion that the amount charged was excessive? If this were the rule, no man could make such a contract with safety. Of course, where the amount agreed upon as compensation for time and services is out of all reason, this fact may be some evidence of an unlawful intent, just as a grossly inadequate consideration for a conveyance may be some evidence of fraud. But that the compensation agreed upon is large, or more than the court might think the services to be worth, will not of itself warrant the conclusion that the agreement was intended as a cover for usury. Men's notions concerning the value of their own services are often so widely different from the notions of other men on that subject, that any man may honestly believe his services are worth a good deal more than other men would concede them to be—a fact of which we have daily proofs in all kinds of employment. Indeed, many men, in all good faith, place a valuation upon their services which other men regard as absurd. The fact, then, that a man has demanded for his services a larger amount than others might think those services worth has but little tendency to prove that he acted in bad faith. Where a man who has conveyed his property seeks to establish fraud in the conveyance by proving inadequacy of price he is bound to show

that the inadequacy is so gross as to be of itself clear evidence of fraud (*Parmelee v. Cameron*, 41 N. Y., 392, 395-396; *Tennant v. Tennant*, L. R. 2 H. L. Sc. App., 6); but the rules respecting proof of usury are quite as strict as those respecting proof of fraud, if not more so (*White v. Benjamin*, 138 N. Y., 623, 624), and by analogy to the rule adopted where fraud is the issue, the receiver, who alleges usury, should be required to show that the value of the services was so grossly inadequate as to warrant no other inference than that Burden, when he stipulated for the compensation mentioned in the agreement, must have acted in bad faith.

As the evidence was introduced for the purpose of showing that the writing did not express the true intent of the parties, the case may be considered in this way:—Suppose the court were now asked to reform the writing, so to express the real agreement, would the evidence be sufficient to warrant a decree to that effect? Certainly no one would make that contention (*Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453, 455). But why should the court be more lax, where the writing is attacked for the purpose of working a forfeiture? If there is any difference between the two cases, it is in the latter that the more stringent rule should be applied.

VII.

The order of the District Court was erroneous for the reason that the right of the bankrupt to avoid the assignment for usury without offering to pay the money advanced to him did not pass to the receiver.

In determining the rights of the parties we must bear in mind that the proceeding is equitable in its character, and that the rights of the parties are governed by equitable rules (*Bardes v. Hawarden Bank*, 178 U. S. 525, 535; *in re Chose*, 124 Fed. 753, 755; *Batchelder & Lincoln Co. v. Whitmore*, 122 Fed. Rep. 355, 360). The question then is, How would a court of equity deal with the situation? To settle this point, we must first ascertain what rights of the bankrupt were acquired by the receiver.

Assuming that he has all the rights which the statute confers upon the trustee, he is vested with "property which prior to the filing of the petition he [the bankrupt] could by any means *have transferred*." (Bankruptcy Law, Sec. 70). Now, what rights could the bankrupt transfer? This is defined by Section 375 of the New York statute known as the General Business Law, which is as follows: "A cause of action to cancel, or otherwise affect, an instrument executed, or an act done, as security for a usurious loan or forbearance, can be transferred, where the instrument or act creates a specific charge upon property, which is also transferred in disaffirmance thereof, and not otherwise; but, in that case, the transferee does not succeed to the right, conferred by

statute upon the borrower, to procure relief, without paying, or offering to pay, any part of the sum or thing loaned."

This section was formerly section 1911 of the Code of Civil Procedure, and was first enacted in 1880. As stated by Mr. Throop, in his note to the section, (Throop's Code), it was intended to codify the rule laid down in some of the decisions, among which was *Wheelock v. Lee*, (64 N. Y. 242). That case was an action by an assignee in bankruptcy to recover moneys alleged to have been paid by the bankrupt in excess of legal interest on various loans, and to require the lender to deliver up the note made by the bankrupt upon the alleged usurious loan, and also certain other notes alleged to have been transferred as collateral security thereto. The court held that the action was not maintainable, because the plaintiff, who was "an assignee by operation of law", had not offered to pay the sum actually loaned.

Now, from this it is apparent that the relief granted to the receiver in this case, viz., a direction that Burden re-assign the accounts to him (fol. 461) is one which the State Courts would not have granted, without at least imposing as a condition that the receiver pay the sum actually advanced by Burden. But as this proceeding is equitable in its character, and as the question arises upon a State statute, why should the court of bankruptcy not deal with it exactly as it would be dealt with, if it had arisen in a State court sitting in equity?

VIII.

The usury laws of New York, as they at present exist, deny to the appellee the equal protection of the laws.

If the appellant had filed any pleading containing an averment that the contract was in violation of the State statute avoiding contracts in which more than six per cent. interest is agreed for, the appellee, intending to question the constitutionality of that statute, might have been required to raise that question in some appropriate pleading on his part. But as the appellant did not file any pleading, and did not otherwise apprise the appellee of his intention to rely upon this statute, the appellee had no opportunity to introduce the issue in this way. All he could do was to call the attention of the court to the point, in the brief submitted by his counsel, which was done.

If, however, some exception is necessary to raise the question, it fairly arises upon the exception to the admission of the testimony respecting the oral declarations of the appellee. When this testimony was offered the purpose of it was not stated, and the appellee, not being apprised of that purpose, could not interpose any objection, except the objection usual in such cases, that the negotiations of the parties had been merged in the writing, and that the writing itself was the only evidence of their agreement. When, therefore, the appellant seeks to show the competency of that evidence by calling the attention of the court to a statute, which he has not referred

to in any pleading or in the course of the trial, surely the appellee who has objected to the evidence and excepted to its admission, should be allowed to sustain his exception by insisting that the statute so relied upon to furnish a justification for the evidence deprives him of a right guaranteed to him by the constitution of the United States. (See *People v. Houghton*, 182 N. Y. 301, 304).

The statutes of New York upon the subject of usury so far as they are material here are as follows:

“The rate of interest upon the loan or forbearance of any money, goods or things in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time.” (General Business Law, Sec. 370).

“No person or corporation shall, directly or indirectly, take or receive in money goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.” (Id. Sec. 371.)

“Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representative, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery. If such suit be not brought within the said one year, and prosecuted with effect, then

the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by an overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made." (Id. Sec. 372.)

"All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods, or other things in action than is above prescribed, shall be void. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled." (Id. Sec. 373.)

"In any case hereafter in which advances of money, repayable on demand, to an amount not less than five thousand dollars, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon in writing by the parties to such transaction." (Id. Sec. 379.)

“Every bank and private and individual banker doing business in this state may take, receive, reserve and charge on every loan and discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or evidence of debt has to run.” (Banking Law, Sec. 74).

“The knowingly taking, receiving, reserving or charging a greater rate of interest shall be held and adjudged a forfeiture of the entire interest which the note, bill of exchange or other evidence of debt carries with it, or which has been agreed to be paid thereon. If a greater rate of interest has been paid, the person paying the same or his legal representatives may recover twice the amount of the interest thus paid from the bank or private or individual banker taking or receiving the same, if such action is brought within two years from the time the excess of interest is taken. The purchase, discount or sale of a *bona fide* bill of exchange, note or evidence of debt payable at another place than the place of such purchase, discount or sale at not more than the current rate of exchange for sight draft, or a reasonable charge for the collection of the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than six per centum per annum.” (Id.)

“The true intent and meaning of this section is to place and continue banks and private and individual bankers on an equality in the particulars herein referred to with the national banks organized under the act of congress entitled ‘An act to provide a national currency secured by pledges

of United States bonds, and to provide for the circulation and redemption thereof, approved June third, eighteen hundred and sixty-four.' '' (Id.)

Now, it will be seen that these statutes do not affect all persons alike, and are not uniform in their operation. All persons and corporations are forbidden to take more than six per cent interest, but the penalties for violating the law are different in different cases. Nor is this difference made to depend upon any classification of loans, but entirely upon the question, Who is it that has broken the law? If the contract now before the court had been made by a bank, or an individual banker, or a private banker, then (assuming it to be usurious, the penalty would be only a forfeiture of the interest (*Caponigi v. Altierie*, 165 N. Y. 255.) But because the appellee can not bring himself within that favored class, he is to forfeit his entire principle!

The reason for this discrimination in favor of banks and bankers is stated in the statute itself, viz: that the legislature intended to place them on an equality with the banks organized under the National Bank Act; and the highest court of the State has held that this statement is controlling. (*Farmers Bank v. Hall*, 59 N. Y. 53). But is this a sufficient reason to take the case out of the constitutional requirement that "no state shall deny to any person within its jurisdiction the equal protection of the laws"? If it is, then the constitutional guaranty in a matter of this sort would amount to very little. Upon that theory, the legislature could include within the class subject to the lesser penalty, all persons and corporations competing with the citizens

or corporations of other states and countries, and could leave the heavier penalties to be borne only by those who have no such competitors. Thus, it might, with equal good reason, include the insurance companies of the State among those liable only to a forfeiture of the interest. So, it might place in this class all loan companies organized under the State law, or all persons doing business as factors, or cotton-brokers, or warehousemen, in short, all persons who, in the ordinary course of their business, make advances to their customers, and who have to compete with concerns in Jersey City or Philadelphia or Chicago or Boston, or elsewhere. If it is once admitted that the reason declared by the legislature for the discrimination in this case will warrant the imposition of different penalties upon different persons for the same thing, then, whenever the legislature shall prohibit contracts of a certain kind, it will never be without an excuse for prescribing that for making such a contract, one man shall be punished in one way and another man in another way.

Nor can it be said that this legislation comes within the power of the legislature to regulate the business of banking. The lending of money is not, like the receipt of deposits, or the issue of circulating notes, a business peculiar to banks; but is a thing which every man may do, if he will. Nor did the legislature in this enactment attempt any such regulation. It prescribed the same rate of interest for banks that it prescribed in the General Business Law for others, and by necessary implication forbade banks and bankers to take a higher rate. They are not permitted to do what is forbidden

to others; the prohibition is the same as to all; and a contract by a bank or banker for a higher rate is just as much a violation of the law as a similar contract made by anyone else. It is in the *punishment of the offense that the difference exists*. If the contract before the court had been made by a private banker, then, assuming it to be usurious, why should he have pleaded that he was a banker? Not to show that he was authorized to make the contract, but to show that the penalty for his violation of the law should not be a forfeiture of the principal, but a forfeiture of the interest alone. He would plead that fact, not to justify his act, but to mitigate the punishment. But the Constitutional mandate that "no state shall deny to any person within its jurisdiction the equal protection of the laws" requires that no different or higher punishment shall be imposed upon one than such as is prescribed for all for a like offence. (*Barber v. Connolly*, 113 U. S. 27, 31; *Yich Yo. v. Hopkins*, 118 U. S. 356, 367.)

Nor can it be said that the discrimination is slight or unimportant. The number of State banks, trust companies, savings banks and individual and private bankers in the State of New York will run into the hundreds, and the total amount of their loans probably exceeds the aggregate of the loans made by all the persons and corporations who are liable to the greater penalty. In fact, it is mainly upon those doing business in a small way that the heavier punishment is visited, while the lighter penalty falls upon those doing "big business."

In addition to the discrimination against the appellee in the matter of the penalty, he is fur-

ther denied the equal protection of the laws, in that his contract (if usurious) is condemned as illegal, while other contracts, equally within any mischief which usury laws are intended to prevent, are declared to be valid and enforceable. While his contract for advances upon the security of assigned accounts may be declared void, because the rate of interest was more than six per cent, yet the legislature has expressly enacted that upon demand loans of five thousand dollars or more any rate of interest may be agreed on, if the security given consists of warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, or bonds or other negotiable instruments.

Now, it is conceded for the purposes of argument, that the legislature may classify loans, and upon some loans may forbid more than six per cent interest to be charged, without limiting the rate upon other loans. For example, the legislature might, for the protection of necessitous persons, limit the rate of interest where an assignment of salary or a mortgage upon household chattels is taken as security, though the parties to loans of another character might be allowed to agree on any rate. For such a classification there would be some reasonable basis. But what basis is there for distinguishing between an advance of ten thousand dollars upon the security of open accounts, and an advance of a like sum secured by a pledge of bills of exchange or promissory notes? In either case, the security consists of choses in action owned by the borrower—indebtedness due to him from third persons—and whether that indebtedness is represented by book accounts or by negotiable instruments, is a mat-

ter of form rather than of substance. If, in the present case, the bankrupt had gone through the form of drawing drafts upon his debtors, and had then turned over these drafts as collateral security, instead of assigning the accounts, the contract would have been perfectly valid, no matter what interest was charged. So, if he had taken notes from these debtors, and had transferred the notes. The intention was to pledge the amounts to become due to the bankrupt, and how could it be important—in view of any policy involved in the usury law—that that indebtedness was in the form of open accounts payable in ninety days, rather than in the form of promissory notes payable in that time? The distinction between the two cases is unsubstantial, and the discrimination against loans made upon the security of assigned accounts is merely arbitrary. But as said in *Gulf, Colorado & Santa Fe Ry. v. Ellis* (165 U. S., 155, 165-166), “the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth amendment, and in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.” (See also *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558-563; *Cotting v. Kansas City Stock Yard Co.*, 183 U. S. 79; *People v. Orange County Road Cons. Co.*, 175 N. Y. 85, 89; *People v. Duryea*, 198 N. Y., 1, 11.)

IX.

The decree of the Circuit Court of Appeals should be affirmed.

JOHN J. CRAWFORD,

Counsel for Appellee



Office Supreme Court, U. S.
FILED.

DEC 11 1912

JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1912,

No. 591.

CLARENCE S. HOUGHTON, as Receiver in Bankruptcy of
the Assets and Effects of Abram L. Canfield, Bankrupt,
Appellant,

against

WILLIAM H. BURDEN,

Appellee.

Motion to Affirm and Notice.

Appeal from the United States Circuit Court of Appeals
for the Second Circuit.



SUPREME COURT OF THE UNITED
STATES.

CLARENCE S. HOUGHTON, as Re-
ceiver in Bankruptcy of the
Assets and Effects of Abram
L. Canfield, Bankrupt,

Appellant,

vs.

WILLIAM H. BURDEN,
Appellee.

Oct. term, 1912.
No. 591.

2

Comes the appellee in this cause and moves the
honorable court to affirm the decree herein, it be-
ing manifest that the questions on which the de-
cision of the cause depend are so frivolous as not
to need further argument, or if the court shall be
of opinion that there is any question which needs
to be argued, then to place the cause upon the
summary docket.

3

JOHN J. CRAWFORD,
Counsel for Appellee,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

4

SUPREME COURT OF THE UNITED
STATES.

CLARENCE S. HOUGHTON, as Re-
ceiver in Bankruptcy of the
Assets and Effects of Abram
L. Canfield, Bankrupt,
Appellant,

Oct. term, 1912.
No. 391.

vs.

5

WILLIAM H. BURDEN,
Appellee.

PLEASE TAKE NOTICE that the undersigned will move this Court at a term thereof to be held at the Court Room in the City of Washington, District of Columbia, on the 16th day of December, 1912, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to affirm upon the ground that the appeal is frivolous, or in the alternative, for an order placing the case upon the summary docket.

6

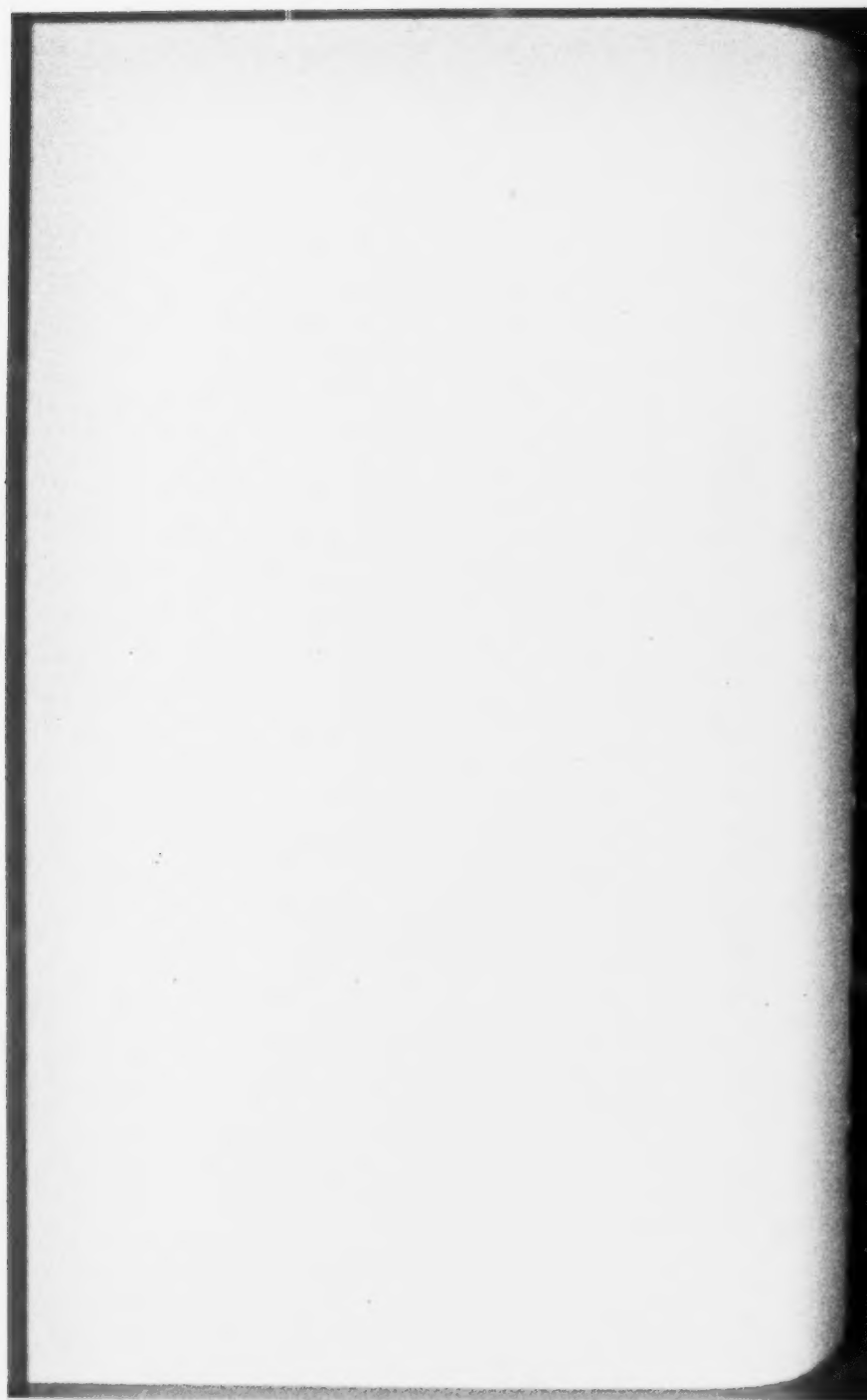
Dated, New York, November 25th, 1912.

JOHN J. CRAWFORD,
Counsel for Appellee,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

TO JACOB J. LAZAROE, ESQ.,
Counsel for Appellant.

Due and timely service of the above notice of motion and of a copy of the annexed brief is admitted this 25th day of November, 1912.

JACOB JNO. LAZAROE,
Counsel for Appellant



Supreme Court of the United States.

CLARENCE S. HOUGHTON, AS RE-
CEIVER IN BANKRUPTCY OF THE
ASSETS AND EFFECTS OF ABRAM
L. CANFIELD, BANKRUPT,
Appellant,

vs.

WILLIAM H. BURDEN,
Appellee.

October Term,
1912.
No. 591.

BRIEF FOR APPELLEE.

Statement.

This is a motion under paragraph five of Rule Six to affirm upon the ground that the appeal is frivolous. The appeal is by a Receiver in Bankruptcy from an order of the Circuit Court of Appeals for the Second Circuit, reversing an order of the District Court for the Southern District of New York. The proceeding is of the sort commonly called a reclamation proceeding, and was instituted by William H. Burden, the appellee here, and appellant below, to procure an order directing the receiver of Abram L. Canfield, a bankrupt, to pay over certain moneys collected by the receiver on accounts which the bankrupt had as-

signed to the appellee. The matter was referred to a Special Master who reported that the accounts were assigned in pursuance of an agreement which was wholly void for usury, and that they were the property of the bankrupt's estate; and this report was confirmed by the District Court. The order of confirmation was reversed by the Circuit Court of Appeals. The order of reversal does not show whether the reversal was upon the law, or upon the facts, or upon both (Record, p. 169).

The record discloses the following state of facts: At the hearing the appellee put in evidence a contract by which he agreed to make certain advances upon accounts to be assigned by the bankrupt. The debtors were not to be notified, but the bankrupt was to act as agent of the appellee in making the collections, and for the protection of the appellee, the bankrupt gave a bond made by the Fidelity and Casualty Company of New York, conditioned to indemnify the appellee (1) if any of the assigned accounts should be fictitious, or (2) if the bankrupt should fail to pay over any part of the collection.

By the express terms of the bond, the contract between the bankrupt and the appellee was made a part thereof, and it was expressly stipulated, as a condition of the liability of the Surety Company (1) that the appellee should enforce all the provisions of his contract with the bankrupt; (2) that the appellee should require the bankrupt to state in writing at the time of assigning each account the date when the payment of such account would be due; (3) that if the payment of any account should not be made within twenty days after such date, the appellee should there-

upon immediately make demand upon the debtor by registered mail; (4) that the appellee should require the bankrupt to file with him in connection with each account, a certificate signed by a responsible employee stating that the account referred to in the certificate represented a *bona fide* sale, and that the merchandise had been shipped to the customer; (5) that the appellee should at least monthly make an examination of the accounts of the bankrupt which should embrace (a) a complete examination of the books, accounts, and vouchers of the bankrupt respecting the accounts assigned, and (b) a strict comparison between all unpaid accounts as such accounts should appear on the records of the appellee and as they should appear in the books of original entry of the bankrupt.

For the time and labor which would be required in the performance of these stipulations, the parties agreed in their contract that the appellee should be compensated. The terms of the agreement on that head were these:

"VII. The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected" (fol. 30).

Upon the hearing the bankrupt, who was called as a witness on behalf of the Receiver, was ex-

amined by counsel for the Receiver concerning certain conversations which the bankrupt stated took place between him and the appellee at the time of the execution of the written contract, and over the objection of the appellee that all the negotiations of the parties were merged in the writing, and that the writing spoke for itself, this witness was allowed to testify that when the written agreement was submitted to him by the appellee, he asked the appellee what was meant by the clause in reference to services, and that the latter replied, "that was simply to get around the usury law" (fols. 257-258, 266-269). One of the subscribing witnesses—Miss Hess, who afterwards became Mrs. Herzog—was then called as a witness on behalf of the receiver, and over like objection and exception, was allowed to testify to conversations between the bankrupt and the appellee held before the agreement was signed, and among other things was permitted to testify that she heard the appellee say that the one per cent was "to cover the bonus and usury charge" (fols. 279-280, 282-286). The appellee was then called in his own behalf, and denied that any such conversations occurred (fols. 363-366), and in this he was corroborated by a man named Kohler, the other subscribing witness to the agreement (fols. 317-322). The Special Master credited the story told by the witnesses for the Receiver, and upon that testimony found that the contract was usurious and void.

ARGUMENT.**I.**

No error is assigned which this Court need notice, since there is no assignment which is not insufficient, either because it refers merely to what was said in the opinion, or is too general and indefinite to meet the requirements of the rule.

An examination of the twenty assignments of error filed by the appellant (Record, pp. 171-173) will disclose that all except the fifteenth and twentieth—which are insufficient for other reasons—are aimed at nothing except statements and arguments found in the opinion. But this court has repeatedly held that the opinion is no part of the record. In *England v. Gebhardt* (112 U. S., 502) the court said: “Neither is the opinion of the court a part of the record. Our Rule 8, Sec. 2, requires a copy of any opinion that is filed in a case to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below.” (See also *Williams v. Norris*, 12 Wheat, 117; *Saltonstall v. Birtwell*, 150 U. S. 417, 419; *Stone v. United States*, 164 U. S. 380, 382.)

The only exception made to this rule is that, in proper cases, the court has examined the opinion to ascertain whether a Federal question was involved. (*Murdock v. City of Memphis*, 20 Wall. 590, 633; *McManus v. O’Sullivan*, 91 U. S., 578; *Gross v. United States Mortgage Co.*, 108

U. S., 477.) The reason for the exception is obvious. In some cases it would be impracticable to have the record show that a right or immunity under the constitution or laws of the United States was claimed, and this can be made to appear only by evidence outside of the record; and from the necessity of the case, the court looks to the opinion, just as it sometimes receives a certificate from the State Court that a Federal question was raised and decided. (See *Murdock v. City of Memphis*, 20 Wall., 590, 633.)

But while this exception to the practice which prevails in other courts has been allowed from necessity, the court has never permitted the opinion to be used for the purpose of assigning such errors as ordinarily occur; and obviously such a departure from the usual and orderly course of procedure would produce only uncertainty and confusion. In Illinois, where the Appellate Courts—which are intermediate courts of appeal corresponding to the Circuit Courts of Appeal in the Federal system—are required by statute to briefly state in writing the reasons for their decisions, the Supreme Court of the State has said: “To say that error can be assigned upon that writing seems little less than absurd. Those courts are required to pass upon questions of fact, but they are not required to state in their opinions that such duty has been performed, nor by what process of reasoning they reach their conclusions. * * * What the court below may have assigned as reasons for its decision can in no way affect the correctness of the judgment, however instructive it may be in ascertaining the points upon which the case was considered and decided in that court.” (*Pennsylvania Company v.*

Verstein, 140 Ill., 637, 640; 15 L. R. A. 798.) So, in a recent case the Court of Appeals of New York said: "While we require the opinions written to be printed and made a part of the record, they do not form a part of the judgment roll. We do not, therefore, look to the opinions for the purpose of determining the contents of an order, finding, or judgment, or its meaning. We only examine the opinions for the purpose of ascertaining the arguments made and the reasons given in support of the rulings and determinations made by the court whose order or judgment is under review" (*Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y. 520, 526).

This practice of the highest courts of Illinois and New York does not rest upon any thing peculiar to the procedure in those states, but upon considerations equally applicable to any other appellate court. Indeed, it only conforms to what was said by Chief Justice Marshall in *Williams v. Norris* (12 Wheat. 117, 119-120), viz.: "It [the opinion] can be introduced for no other purpose than to suggest to the superior court those arguments which might otherwise escape its notice, which operated in producing the judgment." It is quite true that in subsequent cases this court has not adhered strictly to the views expressed in *Williams v. Norris*. But certainly, there can be no reason for departing from them so far as to allow the use of the opinion for the purpose of showing whether the reversal was upon the law or the facts, when that matter may be so easily made to appear by the order or judgment itself.

If any proof were required of the unsuitableness of the opinion as a support for the assign-

ment of errors, we have to look no further than the assignments filed in this case. The sixth, seventh, eighth and ninth go only to "the process of reasoning" employed by the Circuit Court of Appeals (see *Randall v. N. Y. Elevated R. R. Co.*, 149 N. Y., 211, 213) and though they might be perfectly good, the decision of the court might still be correct.

In *Loeb v. Columbia Township Trustees* (179 U. S., 472, 485) this court, after deciding that the opinion of the Circuit Court "may be examined in order to ascertain whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States," was careful to add: "*By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.*"

Now, certainly in the present case, it would have been quite feasible to have had the record show the points decided by the Circuit Court of Appeals. Indeed, the appellant had only to follow the state practice, and have inserted in the order of reversal a recital showing whether the reversal was upon the law, or upon the facts, or upon both. (*Van Tassell v. Wood*, 76 N. Y., 614; *Townsend v. Bell*, 167 N. Y., 462, 467-469.) Then he would have had something against which he could properly direct his assignments of error. But as he has not caused it to appear by the order of reversal, or otherwise in the record, that the Circuit Court of Appeals passed upon the weight

or preponderance of the evidence, he is in no position to allege that the court committed any error in that regard. Hence, the eighteen assignments of error which have reference to those questions need not be noticed by this court.

As to the other two assignments of error, the fifteenth and the twentieth, while they refer to the record, they certainly do not set out with "particularity" the error asserted. To say that the Circuit Court of Appeals erred in reversing the order of the District Court, and in not affirming that order, points to no contention which the court might not infer from the mere fact that the appeal was taken. And as the order of the Circuit Court of Appeals does not show whether the reversal was upon the facts or upon the law, the court could discover the alleged error only by reading the entire record, and examining all the evidence and all the rulings. A plainer case of a failure to comply with the rule could hardly be imagined. In this respect, the case is like *Fidelity & Deposit Co. v. Anderson* (102 Ga., 551). There the cause involved questions both of law and fact, and was tried before the court without a jury. The assignment of error was a general one, not specifying how or wherein the trial judge erred in his judgment, whether as to matter of law or as to matter of fact. It was held that the assignment of error was too general to be considered, and the writ or error was dismissed. (See also *Lytle v. Prescott*, 57 Minn. 129.)

In *Deitsch v. Wiggin* (15 Wall. 239, 246), the Court said:

"That rule [No. 35] is necessary to the disposition of the business which presses upon

us, and it is our intention hereafter to enforce strict compliance with its demands. If errors are not assigned in the manner required, the assignments will be treated as if not made at all."

Now, certainly, these observations are quite as pertinent now as then, especially when the appellant would impose upon the court a duty which the highest appellate court should never be required to perform. (See *Montgomerie v. Wallace*, L. R. A. C. (1904) 73, 83, per Lord Davey). And while this court may sometimes notice a plain error of *law* not assigned, there can be no good reason why it should read through all the evidence, unless the question of the weight of evidence is raised by an assignment of error which strictly complies with the rule.

II.

In a proceeding of this sort, where the equity practice is adopted only by analogy, this Court should not notice assignments of error which refer only to the weight of evidence, especially when, as in the present instance, the record discloses no claim or defense in equity.

The errors assigned by the appellant have reference only to the weight of evidence. (Record, pp. 170-172.) Now, if this were a "proceeding in

bankruptcy" such an assignment of errors would present no question for this court to review, since, in a proceeding of that character, the decision of the Circuit Court of Appeals upon the facts is conclusive. (General Order XXXV) But is there any reason why a different practice should prevail merely because the appeal is in "a controversy arising in bankruptcy proceedings"? The answer to this would seem to depend upon whether or not such appeals are to be treated *in all respects* as if they were appeals in equity.

When we look at the record in this case we see that it presents no question of equitable jurisdiction. The receiver has set up no right which, if asserted in a plenary suit, would be cognizable on the equity side of the court. His claim is that the contract was usurious—a contention he could make in any court of law. Upon what ground, then, can this court be asked to examine the facts? Certainly not because the proceeding is a suit in equity, but merely because the appeal is from a decision of the Circuit Court of Appeals in a proceeding which originated in a court of bankruptcy.

In addition to the fact that the proceeding pertains to no matter of equitable right, we are to note that it would not even be within the jurisdiction of the Federal courts, except for the casual circumstance that one of the parties happens to be a receiver in bankruptcy. The parties are not, so far as the record shows, citizens of different states; nor is the construction of any Federal statute involved, but merely the application of a statute of New York. The matter then comes to this, that in a proceeding concerning only *legal* rights, where a state statute is to be applied, and

no right or immunity under the constitution or laws of the United States is claimed, and where the Federal jurisdiction is entirely accidental, this court is asked to perform the most ordinary function of a common jury, namely, to decide a question of veracity between witnesses.

That such a duty should be imposed upon the court even where the amount involved is ten thousand dollars, seems quite preposterous. But with this case as a precedent, where would the matter end? Receivers and trustees in bankruptcy have many controversies with third persons respecting the title to property claimed to be a part of the bankrupt's estate, and in most of these the issue of fact is as sharply contested as in the present case. Now, shall this court have to decide such an issue whenever either party sees fit to bring it here? When we recall that the jurisdictional amount is only one thousand dollars, we can easily see what consequences must follow. Trivial disputes, involving only questions of veracity between witnesses, would clog the docket, and seriously impede the proper business of the court. Certainly a practice which would result in such public inconvenience ought not to be adopted, except for reasons that are imperative.

The appellee does not mean to contend that the court is without power to pass upon the facts; for he must concede that the case is properly brought here by an appeal (*Hewett v. Berlin Machine Works*, 194 U. S. 296). But *must* the court exercise that power, when the record discloses that the case involves no equitable principles and could not have originated in a court of equity? Does the mere fact that the mode of procedure is an ap-

peal, and not a writ of error require the court to treat the case as it would a suit for specific performance or for a permanent injunction, or for other equitable relief? Unless the court is to be bound by what is at most a mere matter of form, it must have the right to look into the nature of the case, and to conform the practice to what is befitting the character of the controversy, preserving the fundamental distinction between the procedure which is proper in cases involving equitable rights, and that which is appropriate when only legal rights are to be determined. When we look at the present record we find no question raised which could not be decided in a court of law, and the case to which it bears the nearest resemblance is an action at law tried before the court without a jury. Why, then, does not the former practice of this court upon appeals in that class of cases furnish the true analogy? (Rev. Stat. U. S. 700. *Dirst v. Morris*, 14 Wall. 484; *Capelin v. Insurance Co.*, 9 Wall. 461; *United States v. Dawson*, 101 U. S. 549). Why must the equity practice be adopted when the equity jurisdiction is not invoked? Certainly, if there ever was a case where regard is to be had to substance rather than to form this is such a case. For what could be more absurd than that suitors who have questions of greatest moment to submit to the court, should have to wait while the court stops to decide the trifling question: Whose witnesses told the truth concerning the oral declaration of a party as to the meaning of a written contract he was about to execute?

As we have seen, the Federal jurisdiction in this case depends wholly upon the fact that one of the parties is a receiver in bankruptcy. The Bankruptcy act then, is the only source of jurisdiction.

Now, that act contains this provision: "All necessary rules, forms and orders as to procedure * * * and for carrying this act into effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States;" (Sec. 30). In pursuance of the power so conferred this court has promulgated a rule that in bankruptcy proceeding the court from which the appeal is taken must make findings of fact, which are conclusive here. (Rule XXXVI). While this rule applies only to "proceedings in bankruptcy" the power of the court to regulate the mode of procedure is not limited to that particular class of proceedings. The words of the statute are "All necessary rules * * * as to procedure." This language is general and comprehensive, and fairly embraces the procedure applicable to any proceeding which originates in a court of bankruptcy. Nor is it important that the court has not yet adopted a rule by which the findings of the Circuit Court of Appeals are made conclusive in a "controversy arising in bankruptcy proceedings"; for as the court has power to prescribe *all* rules of procedure, it is not material whether the power is exercised by promulgating formal rules, or by making rulings from time to time as occasion may require. And while this case is not controlled by rule XXXVI, that rule affords a just *analogy* when the court is asked to review the facts.

No doubt, all proceedings in a bankruptcy court are, as said in *Bardes v. Howarden Bank*, (178 U. S. 533) "in the nature of proceedings in equity." But obviously this means no more than that there is an *analogy* between the two; for bankruptcy is a separate head of jurisprudence

just as admiralty is. The courts of bankruptcy are vested with jurisdiction "*at law and in equity*", (Bankruptcy Act, Sec. 8) and they apply the rules of law or the rules of equity as the nature of the case may require. Indeed, the record now before the court furnishes an illustration of a proceeding in which no question of equity jurisprudence has arisen. The practice is *assimilated* to that in equity, but it is not the same thing; and as in other cases where the practice in one court is conformed to that of another, conformity should be carried no further than convenience and expediency require.

A circumstance which makes an appeal upon the facts seem especially out of keeping in the present case is that the case comes up from a court sitting in a state where the highest court is relieved from the duty of reviewing facts. (New York Code of Civil Procedure, § 191.) True, the practice in the New York Court of Appeals is not a guide for this court; but it tends to emphasize the unreasonableness of this appeal. For certainly the same considerations which have made it necessary to relieve that court from the duty of deciding questions of fact apply with greater force to this court. In England the Court of Appeal will not allow an appeal to the House of Lords in a bankruptcy case upon a question of fact. (*Ex parte Miles*, L. R. 2 Q. B. Div. 39, 47; *In re Lake*, K. B. Div. [1901] 710, 719; *Ex parte Hayman*, L. R. 8 Ch. Div. 11, 26), and for the same reasons this court should refuse in that class of cases to notice assignments of error which refer only to the weight of evidence.

III.

If the statement in the opinion of the Circuit Court of Appeals that the burden of proof was strongly on the trustee is to be regarded as a ruling on a question of law no argument is required to establish its correctness.

In the assignment of errors filed in this Court by the appellant, it is assigned for error that the Circuit Court of Appeals determined "that the taking of usury being a crime, the burden was strongly upon the trustee to prove his contention in that regard." (Record, p. 172). This refers to a statement made in the course of the opinion. (Record, p. 167). Now, even if this could be regarded as a ruling upon a question of law, it is so obviously correct that no argument upon the subject would be useful. For the court was speaking with reference to a statute of New York, and the highest court of that State has repeatedly declared this to be the rule. In *White v. Benjamin*, (138 N. Y. 623, 624), that Court said: "Usury is a crime, and he who alleges it as a defense to an obligation to pay money must establish it by clear and satisfactory evidence. He enters upon the defense with the presumption against the violation of the law, and in favor of the innocence of the party charged with the usury. He cannot properly claim to have the usury inferred where the evidence is inconclusive and just as consistent with the absence as with the presence of usury. It is a just requirement that all the facts constituting the usury should be proved *with rea-*

sonable certainty, and that they shall not be established by mere surmise and conjecture, or by inference entirely uncertain."

See also

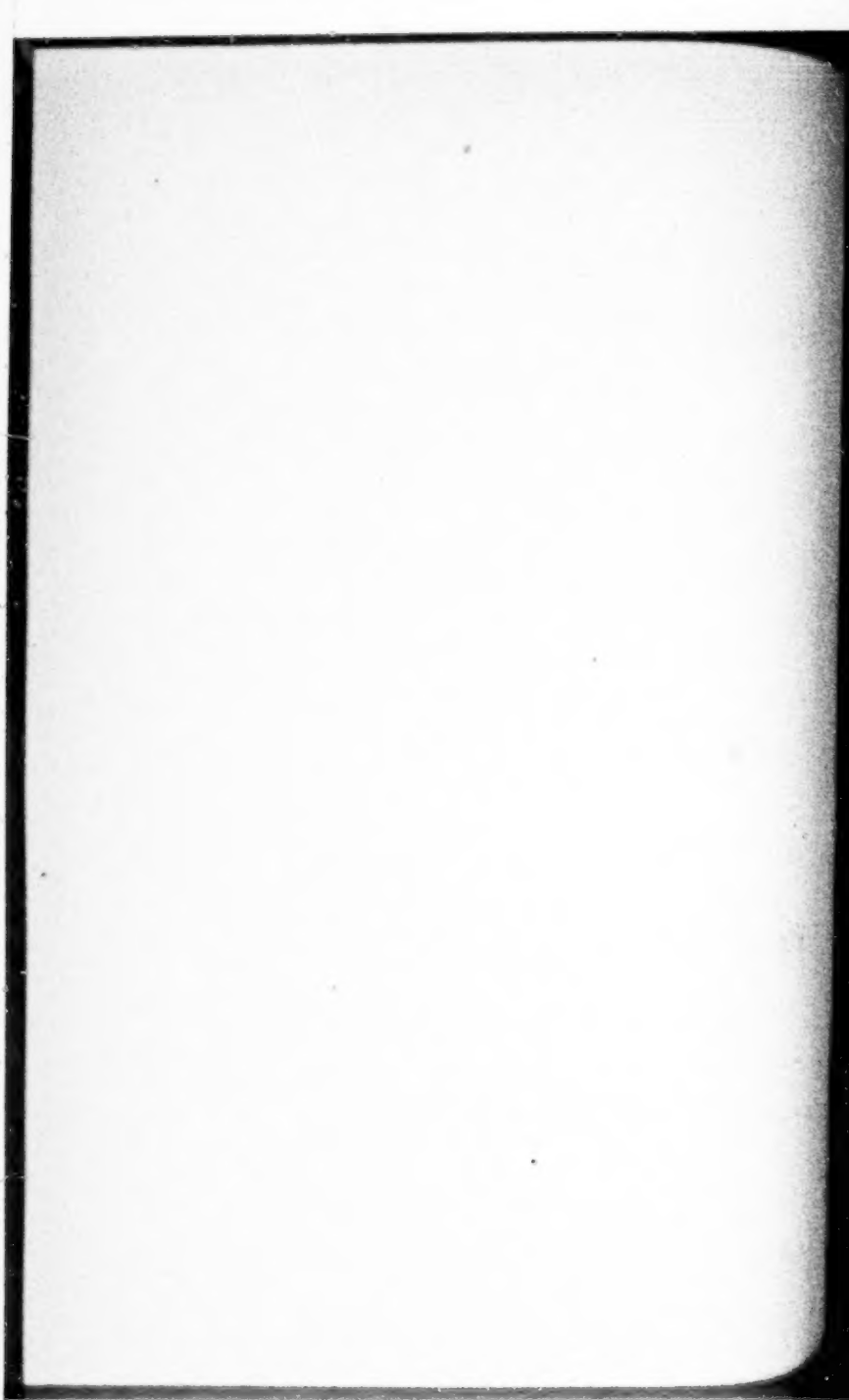
Stillman *v.* Northrup, 109 N. Y. 473, 478.

Rosenstein *v.* Fox, 150 N. Y. 354.

IV.

The decree of the Circuit Court of Appeals should be affirmed, or if the Court shall consider that there is any question to be argued, the case should be placed on the summary docket.

JOHN J. CRAWFORD,
Counsel for Appellee.



Supreme Court of the United States.

CLARENCE S. HOUGHTON, as Re-
ceiver in Bankruptcy of the
assets and effects of Abram
L. Canfield, Bankrupt,
Appellant.

against

WILLIAM BURDEN,
Appellee.

October Term,
1912.

No. 591.

BRIEF FOR APPELLANT.

Statement.

The statement contained in appellee's brief is substantially correct. It may however be added that this proceeding comes before this Court on an appeal from an order of the Circuit Court of Appeals for the Second Circuit, reversing the order of the District Court of the United States for the Southern District of New York which latter Court affirmed the order of the Special Master.

The Special Master sustained the appellant on the law and on the facts. The District Court affirmed the order of the Special Master on law and on the facts.

The Circuit Court sustained the Special Master and District Court on law but reversed the order of the District Court on the facts.

ARGUMENT.

Answer to No. I.

The assignments of error are proper and are sufficient in form and substance.

This motion is made by the appellee under Paragraph 5 of rule 6 to affirm upon the ground that the appeal is frivolous.

It is elemental that that which is frivolous must appear so from an inspection or should be self evident and it is also elemental that that which is self evident requires neither proof nor argument.

In spite of this elemental proposition, the appellee has devoted a brief of seventeen pages in argument in an endeavor to demonstrate that the appeal is frivolous.

This in itself would almost suffice as an answer to appellee's contention.

As we understand it, the appellee advances as his first proposition that the assignments of error are insufficient either because they refer to what was said in the opinion or because they are too general or indefinite to meet the requirements of the rule.

It is not disputed as a matter of practice that the opinion is not a part of the record but that the same is incorporated therein because of the rule of this Court requiring that a copy of any opinion filed in the case be annexed to and transmitted with the record.

The practice followed on this appeal by appellant is that which has been followed in numerous

cases passed upon by this Court, *Hewitt v. Berlin Machine Co.*, 194 U. S., 300. *In re Moore and Bridgman*, 106 Fed., 689. *Moorehouse v. Pacific Hardware, etc., Co.*, 24 Am. B. R., 178.

In the case at bar the matter in controversy being a controversy in a proceeding in bankruptcy, was heard by the Special Master after a full and complete trial of the matters involved. The Special Master made and filed his findings (Rec., pages 14-43). On the findings thus made and filed by the Special Master a motion was made in the United States District Court in the Southern District of New York, to affirm the report and findings of the Special Master and such proceedings were had that the findings were affirmed and an order to that effect entered (Rec., page 152).

From that order as entered, an appeal was taken to the Circuit Court of Appeals for the Second Circuit, the order of the District Court reversed and the order reversing the findings of the District Court which virtually reversed the findings of the Special Master was made by the Circuit Court of Appeals.

A reading of the opinion of the Circuit Court of Appeals (which opinion we deem is properly inserted in the record as guide to the Appellate Court for the determination of the lines of the decision of the Circuit Court), is essential. On examination of this record we disclose the findings of the Special Master and the order of the District Court are affirmed and sustained on the law and reversed on the findings of fact.

It has been the invariable practise of the Circuit Court of Appeals not to interfere with the findings of fact by the District Judge or by a Referee affirmed by the District Judge unless the

findings are clearly erroneous or as it is at times expressed "manifestly against the weight of evidence." *In re Noyes*, 127 Fed., 286. *Burleigh v. Forman*, 139 Fed., 13. *Barton Bros. v. Texas Produce Co.*, 136 Fed., 355. *In re Cole*, 144 Fed., 392; *In re Lawrence*, 134 Fed., 843.

This has been the practise of the Court pursuant to numerous decisions upon the ground that "when the Court has considered conflicting evidence and made the findings or decree, it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the findings or decree must be permitted to stand." *Coder v. Arts*, 152 Fed., 243-243 U. S., 233; *Merchants' Bank v. Cole*, 149 Fed., 708.

The appellant in this case in view of the foregoing, feeling himself aggrieved appeals to this Court upon assignments of error appearing in the record on page 170; an examination of these findings will disclose that they are not frivolous, but are, in the opinion of the appellant, based upon serious errors of the learned Circuit Court in reversing the findings of fact of the Special Master which findings were made and filed after consideration of conflicting evidence and the findings should be considered presumptively correct unless as heretofore quoted some obvious error of law has intervened or some serious mistake of fact has been made.

The opinion of the Circuit Court of Appeals therefore becomes a necessary part of the record to determine the basis of reasoning; a reading of that opinion will disclose that the Circuit Court of Appeals affirms every proposition of law found by the Special Master and by the District Court;

it reverses the Special Master and District Court on the findings that they arrived at after considerable conflicting evidence.

The question then arises, was there a serious mistake of fact made by the Special Master and by the District Court in the findings of fact.

The twenty assignments of error upon which this appeal was allowed by the Circuit Court to this Court are based upon the error committed by the Circuit Court in reversing the findings of the Special Master that had been affirmed by the District Court.

The appellant finds fault with the form and sufficiency of these assignments of error upon the ground that they refer merely to what was said in the opinion.

Our contention is, that these assignments of error are in proper form and are specific enough to bring up this entire case for review before this Court.

If we select any one of these findings as for example the first, second and third assignments of error it would be found that each one of them as well as the others that follow are based upon the findings of the Special Master, the order of confirmation of the District Court and the order of the reversal of the Circuit Court, all of which are essential parts of the record.

The appellee also urges that the fifteenth and twentieth assignments are too general or indefinite. It is our contention that the fifteenth assignment of error alone would be sufficient to bring up before this Court the entire question on appeal. In *Doan v. Amer. Book Co.*, 105 Fed., R. E. B., 772, it was held that an assignment of error in a suit for injunction was proper in form when the error

complained of was "that the Court erred in granting the injunction." If we disregard all other assignments of error we believe that the fifteenth is in itself sufficient and proper upon which this appeal could be heard by this Court.

Answer to Argument No. II.

The appellee has in his argument No. II devoted considerable space to the contention that this Court is without power to hear this appeal.

On page 12 of appellee's brief last paragraph the appellee abandons his contention by saying that he does not mean to contend that the Court is without power to pass upon the facts and concedes that the case is properly brought here by appeal.

The appellee complains that this Court should not exercise power to hear this appeal because the record does not disclose equitable principles and that the case itself could not have originated in a court of equity.

Under Sections 24 and 25 of the Bankruptcy Act special provision is made for an appeal to the United States Supreme Court in cases of this character. The mere fact that there are no equitable principles involved is of no moment.

The practice with respect to appeals in cases of this character is the same as in equity. That is merely the rule of this Court governing the practice in appeals of this character.

This case involves what is termed "a controversy arising in bankruptcy proceedings." This Court has frequently defined and distinguished what is meant by proceedings in bankruptcy and controversies arising in bankruptcy proceedings.

By the latter is meant those independent suits which concern the bankrupts' estate and arise by intervention or otherwise between the trustee representing the bankrupts' estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors.

In re Muller, 135 Fed., 711.

In re Farrell, 176 Fed., 505.

In the case at bar Burden, the claimant, contended that he was entitled to certain outstanding accounts which the Receiver in Bankruptcy claimed belonged to the bankrupts' estate. To substantiate his right Burden, the claimant, intervened in the bankruptcy proceedings to establish that right, thus creating a controversy arising in bankruptcy proceedings. The only method prescribed in the Bankruptcy Act for the Appellate Court to review the controversy of that character is by appeal as distinguished from a petition to review.

Petitions to review or to revise bring up only questions of law, but appeals, both law and facts.

Elliot v. Toeppner, 187 U. S., 327.

Said the Court in the last mentioned case:

"The distinction between a writ of error which brings up matters of the law only and an appeal which unless expressly restricted brings up both law and fact, has been observed by this Court and been recognized by the Legislation of Congress from the foundation of the government."

In re Blanchard Shingle Co., 164 Fed., 311.

The appellee in his brief urges that this Court should not be burdened with an examination of the

facts, for that would necessitate reading of the entire record.

The Circuit Court of Appeals, in reversing the findings of the Special Master and the order of the District Court, could only have done so under the authorities cited in the event of "obvious error of law or serious mistake of fact." To determine the controversies of this ruling, the record must be examined.

The motion to affirm should be denied.

Respectfully submitted,

JACOB J. LAZAROE,
Counsel for Appellant.

[1918]

228 U. S.

Argument for Appellant.

HOUGHTON, RECEIVER, *v.* BURDEN.APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 501. Argued January 7, 1913.—Decided April, 7, 1913.

Where a secured creditor voluntarily comes into the Bankruptcy Court and asserts a claim to property in the trustees' possession, the proceeding is one in equity and the decree is reviewable by the Circuit Court of Appeals both as to law and fact; § 566, Rev. Stat., is inapplicable and the whole case is open under § 128, Judicial Code, and an appeal lies to this court under § 241, Judicial Code.

A contract for loaning money secured by accounts payable to the borrower, who is to act as agent for the lender in their collection, providing that the lender shall, in pursuance of a provision in a bond of indemnity given by third parties, examine the accounts and books of the borrower monthly and receive a compensation therefor equivalent to a specified per cent of the accounts remaining due, *held* in this case to have been made in good faith and not for the purpose of avoiding the usury laws, and not to be a usurious and void contract under the laws of the State of New York.

On an inquiry whether the contract is one forbidden by law, evidence dehors the agreement is admissible to show that, though legal on its face, the agreement is in fact illegal.

Usury may be interposed as a defense even though it contradicts the agreement.

Where the law of the state makes usury a crime, the burden is strongly on him who would avoid a debt on that ground; and where, as in this case, the borrower is supported by one witness who is in his employ and the lender is supported by one disinterested witness, the burden is not sustained.

THE facts, which involve the jurisdiction of the Circuit Court of Appeals to review facts in certain cases coming from the Bankruptcy Court and the construction of usury laws of New York, are stated in the opinion.

Mr. Jacob B. Engel, with whom *Mr. Jacob Jno. Lazaroe* was on the brief, for appellant:

The Circuit Court of Appeals having found that the court below had not committed any errors of law, should have affirmed the final order of the District Court. Section 566, Rev. Stat.; *Campbell v. United States*, 224 U. S. 99; *Rogers v. United States*, 141 U. S. 548; *Campbell v. Boyreau*, 21 How. 223.

Manifestly, if Burden had commenced an action on the facts recited in his petition, as he had a right to do, his only remedy would be an action at law for trover or conversion. Under no circumstances appearing in this record did his cause of action lie in equity; had the appellee attempted to frame his complaint in equity, he would have been defeated under the laws of the State of New York by the plea that he had an adequate remedy at law. *Bradley v. Aldrich*, 40 N. Y. 510.

A matter of the kind at bar is not a proceeding in bankruptcy, hence the exception made by § 566, Rev. Stat., does not apply.

Courts of Bankruptcy are given jurisdiction to try matters in controversy. Section 19, subd. c, clearly relates to the provisions of the Revised Statutes regulating trials by a jury. *In re Baudoine*, 101 Fed. Rep. 574; *In re Russell*, 101 Fed. Rep. 248.

The special master having found certain facts which were confirmed by the United States District Court, the Circuit Court of Appeals should not have reversed the judgment and order entered thereon unless the findings of fact were clearly erroneous or clearly against the weight of evidence. *Davis v. Schwartz*, 155 U. S. 631; *Kimberly v. Arns*, 129 U. S. 512; *Ohio Valley Bank v. Mack*, 163 Fed. Rep. 155.

The preponderance of evidence was in favor of sustaining the findings of the master. *Quackenbos v. Sayers*, 62 N. Y. 345.

That the real motive moving the parties was the giving and taking of an usurious rate of interest and not

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of an employment is abundantly evidenced by the testimony.

No errors of law having been committed in the trial court its order and mandate should be confirmed.

Parol testimony can be introduced for the purpose of showing the real transaction between the parties and showing that the agreement, as drawn, was a mere subterfuge and made with the purpose and intent of evading the usury laws. *Mercantile Trust Co. v. Ginbernat*, 134 App. Div. 410; *Willmarth v. Hine*, 137 App. Div. 528; see also *Knickerbocker Life Ins. Co. v. Nelson*, 7 Abb. N. C. (N. Y.) 180, citing *DeWolf v. Johnston*, 10 Wh. 385; *Vilas v. McBride*, 62 Hun (N. Y.), 324.

This is the law throughout the country. *Massa v. Dauling*, 2 Str. 1243; *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Tucker v. Wilamonicz*, 8 Arkansas, 157; *Train v. Collins*, 2 Pick. (Mass.) 145; *Denyse v. Crawford*, 18 N. J. L. 325; *Grayson v. Brooks*, 64 Mississippi, 410.

The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent it was usurious. *Kohler v. Dodge*, 31 Nebraska, 238; *Rowan v. Hanson*, 11 Cush. 44; *Roe v. Kiser*, 62 Arkansas, 92; *McAleese v. Goodwin*, 69 Fed. Rep. 759.

In all instances of this character, as well as in the case at bar, the instrument is innocent and valid on its face and it is only by resort to extrinsic facts and circumstances that it is invested with the element of illegality.

A contract may not necessarily be usurious on its face; the burden is on the one contesting it upon the ground of usury to prove the guilty intention and that the contract was a cover for usury and for the loan of money upon usurious interest. *Rosenstein v. Fox*, 150 N. Y. 304.

On these questions oral, extrinsic and circumstantial evidence is freely received. *Thomas v. Murray*, 32 N. Y. 605; *Valentine v. Conner*, 40 N. Y. 248.

Mr. John J. Crawford for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is an appeal from a decree determining a controversy arising in a bankruptcy proceeding. The origin of the matter was this: Canfield, the bankrupt, was a merchant in New York. He borrowed from Burden the sum of \$10,000, and as security assigned to him certain book accounts, aggregating the sum of \$14,000, and agreed to act as agent for Burden in their collection. Shortly afterwards he was adjudicated a bankrupt. The receiver obtained possession of the bankrupt's books and held on to the assigned accounts and proceeded to collect them upon the claim that the contract was usurious and void under the law of New York.

In this situation Burden intervened in the bankruptcy case and filed a petition, in which he asserted his title to the assigned accounts and to any proceeds collected by the receiver. The District Court, upon a final hearing, upheld the contention of the bankrupt's receiver, now the trustee, and dismissed the intervening petition. This decree was reversed by the Circuit Court of Appeals, that court holding that the defense of usury had not been satisfactorily made out.

The appellant contends that the controversy having been heard by the district judge without a jury, the Circuit Court of Appeals had no authority to review the facts. For this, § 566, Revised Statutes, is cited, and also the case of *Campbell v. United States*, 224 U. S. 99, which construes that section. But that provision only requires that the trial of issues of fact in the District Court, except in cases in equity and admiralty, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. But the District Court, is, by § 2 of the Bankruptcy Act of 1898, July 1, 1898, 30 Stat. 544, c. 541, when sit-

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ting as a bankruptcy court, given jurisdiction in law and equity for the purpose of collecting and distributing the estate of a bankrupt, and for the purpose of determining controversies relating thereto, except as otherwise provided. The exception has no application here, as Burden voluntarily came into the bankruptcy proceeding and submitted his claim to the adjudication of the bankruptcy court. Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity and a decree is reviewable by appeal to the Circuit Court of Appeals in the exercise of its general appellate powers in equity cases under § 24-a of the Bankruptcy Act. Loveland on Bankruptcy, 4th ed., §§ 826 to 829; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 300; *Knapp v. Milwaukee Trust Company*, 216 U. S. 545. Upon such an appeal the law and the facts are open for reconsideration, and from the decree of the Circuit Court of Appeals, it not being final (§ 128, new Judicial Code), an appeal may be taken under § 241 of the same code.

Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore, an appeal under § 24-a, and not under § 25-b, General Order XXXVI made under the latter section and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases. *Hewit v. Berlin Machine Works*, *supra*; *Coder v. Arts*, 213 U. S. 223, and *Knapp v. Milwaukee Trust Co.*, *supra*.

Coming now to the merits. The single question is one of usury in the contract. The lawful rate of interest in New York is 6 per cent. By § 373 of the General Business Law of New York it is provided:

"All . . . contracts whatsoever . . . whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken any greater sum or greater value for the loan or forbearance of any money,

goods or other things in action, than as above prescribed, shall be void."

Canfield was a reputable merchant engaged in business in New York. Burden was a retired merchant and an experienced accountant, who wished to secure light employment. To secure such employment he advertised that he would lend from \$10,000, to \$20,000, at 6 per cent. to a merchant whose rating was good, if the loan would secure such employment. Through a broker, compensated by Canfield, negotiations were opened with Burden, who proposed the loan provided he could get light employment in Canfield's office as a financial man. But the financial statement of Canfield exhibited to Burden was nearly a year old, and this did not satisfy Burden, and the negotiations fell through partly for that reason, and partly because the parties could not agree upon the position Burden desired. Some weeks later the negotiations were resumed, the broker saying that he might get additional security through an indemnity bond, by which the validity of the book accounts which were agreed to be assigned might be guaranteed as well as the payment of collections made by Canfield as agent. Canfield agreed to furnish such a bond. The proposed bond required the obligee to watch the shipping receipts and to make monthly minute examinations of Canfield's books, showing the several assigned accounts. Finding this requirement to be a condition of such a bond, Burden demanded that he should be compensated for the service he would be required to render to keep the bond in force, and a compensation of one per cent. per month upon the amount of the uncollected accounts at the end of each month was agreed upon. Thereupon the contract in question was executed, a bond of indemnity was given to Burden and something like 100 accounts aggregating about \$14,000 were duly assigned, upon which an advance of \$10,000 was made.

The contract is elaborate and too lengthy to be set out

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in full. In substance it provided for a loan of \$10,000 at 6 per cent. upon assigned accounts against reputable merchants, the loan not to exceed 75 per cent. of the face value of the accounts. Canfield agreed to act as Burden's agent in collecting and to guarantee the payment of each account so assigned. The contract also provided that after the payment of the money borrowed and interest, and costs and expense of collection and the compensation to Burden for his services as required by the bond, the remaining accounts should be re-assigned to Canfield. The clause in regard to this compensation gives rise to the claim of usury. It was in these words:

"The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent. per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected."

The indemnity bond styled an "Assigned-Accounts bond" is in the usual form and is undoubtedly a device resorted to, to enable merchants to use book accounts as collateral for money advanced or loaned. The principal condition was in these words:

"The Obligee shall require the Principal to state in writing at the time of assigning each account, the date when the payment of such account is due, and if the payment of any account is not made within twenty days of the date that such payment is due, the Obligee shall immediately thereupon make demand by registered mail upon the debtor for the amount due. The Obligee shall require the Principal to file with the Obligee in connection with each account a certificate signed by a responsible

official or employé of the Principal stating that the account referred to in the certificate represents a bona-fide sale, and that the merchandise concerned with the account has, prior to signing of the certificate, been shipped to the customer named in the account. The Obligee, at least monthly, shall make an examination of the accounts of the Principal which shall embrace—(1) a complete examination of the books, accounts, and vouchers of the Principal as respects the accounts covered under the said agreement; (2) a strict comparison between all unpaid accounts as such accounts appear on the records of the Obligee and as such accounts appear in the books of original entry of the Principal.”

That this contract upon its face is absolutely legal there can be no serious doubt. A material part of the security which Canfield proposed to give was the bond by which the collection of 75 per cent. of the face value of the assigned accounts was guaranteed, to the extent of \$7,500, as well as that Canfield would promptly pay over any money and checks collected by him as agent for Burden. But a condition of this security was that the obligee should keep a watchful guard over the accounts assigned and make monthly inspection of the books of Canfield. That this would necessitate several days work each month, if actually done with fidelity, is clearly shown. That little service was rendered under this provision aside from the examination of the accounts and shipping receipts as they were assigned at different times, was due to the bankruptcy ensuing within a very short time and the seizure of the bankrupt's books by his receiver.

The contention is that this provision for compensating Burden for the service required by the indemnity bond was a mere cover for unlawful interest, and that it was never intended or expected that any such service would be given. This is sought to be shown by alleged oral declarations of Canfield. Thus, Canfield says that when

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he was about to sign the contract he asked Burden what the clause about services to be rendered meant, and that he replied, "that that was simply to get around the usury law; there were no services to be rendered at all." Canfield's bookkeeper, a Miss Herzog, after saying that in the negotiations prior to the day the agreement was signed that she had heard Burden say that he must have a bonus of one or two per cent. a month as usury, testified as to what she overheard through an open window between her office and that occupied by Canfield at the time the bond was signed, as follows:

"Q. Isn't it a fact that Mr. Canfield asked Mr. Burden what was meant in this agreement concerning services and charges for services to be rendered by Mr. Burden?

"Mr. Crawford. Objected to as leading.

"The Referee. Sustained.

"Q. What did you hear Mr. Canfield say concerning this agreement shown you. A. I don't remember.

"Q. Well, did Mr. Canfield say anything about services or did Mr. Burden say anything about services to be rendered? A. Well, Mr. Burden said he would like to have about an hour's work to do in our establishment every day, and then Mr. Canfield told him we would not have any use for him there."

Burden when recalled testified to his good faith, and that the compensation agreed upon was to be for the service required by the contract and bond and would be worth what he was to receive. He denied in most emphatic terms that he ever demanded a bonus or used the word usury in any of the negotiations, or that he had ever made any such statement or declaration as testified to by Canfield. He was supported in his denial by Koehler, the broker who negotiated the loan for Canfield. All of this evidence was excepted to as contradicting the written agreement and was admitted over objection. Where the inquiry is whether the contract is one forbidden by law,

it is open to evidence dehors the agreement to show that though legal upon its face it was in fact an illegal agreement. Otherwise the very purpose of the law in forbidding the taking of usury under any cover or pretext would be defeated. The defense is one which the debtor may make even though it contradicts the agreement. *Scott v. Lloyd*, 9 Pet. 418.

It has been suggested that there is a distinction between the admissibility of evidence dehors the contract which is intended to show the whole and true nature of the transaction and mere declarations made by the lender in the nature of a confession that the agreement for services required to maintain the obligation of the indemnity bond was a mere scheme to cover usury, and that no service was to be rendered. We notice the distinction and pass it by, for the reason that assuming the evidence to be competent, it is not so convincing as to justify a disagreement with the view of the Circuit Court of Appeals that the defence of usury has not been satisfactorily made out.

The instrument upon its face is not usurious. Of course, if the service to be rendered should be made to appear trivial and of no real importance, the inference might be drawn that the agreement in that particular was a sham and device to cover a mere usurious contract, such as we are asked to believe Burden declared it to be. Burden's plan was that the loan should carry with it light work, such as a retired business man might do,—one or two hours of office work each day, as he explained. But he also requested security for his money. Open book accounts might answer if the borrower had a satisfactory business rating. The latter means everything to business men. Canfield's rating was not late enough to satisfy Burden and the negotiations fell through, and were not resumed for a month or more. Then Koehler, who had before negotiated loans for Canfield, suggested that he should also

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give Burden the indemnity bond. Burden examined the form of such bond, and finding that one of its conditions was his own watchfulness over collections and minute inspections of Canfield's books, he proposed to make the loan upon the assigned accounts and the indemnity bond, provided he was compensated for the service the bond required from him. The amount agreed upon, Burden claims, was no more than a fair return for what Judge Hand, who in the District Court sustained the defense, describes as "work which was undeniably substantial and vexatious."

To hold the agreement void would seem to require that we shall accept as true that there was no such service expected or required, and that the clause was inserted to cover a usurious bonus. But as the indemnity bond was conditioned upon Burden doing the very things which he is said to have declared were not to be done, of what value would that security become? The natural presumption is that Burden was endeavoring to put his contract in such shape that Canfield could not defeat his obligation by the defense of usury. Yet we are asked to believe that he deliberately declared to the debtor that the agreement as to services was a device to defeat the law, and that he was not to render any such service. The incredibility of such a declaration by Burden to Canfield the debtor seems obvious. Upon this point Judge Coxe, for the Circuit Court of Appeals, said:

"Of course bankruptcy was not contemplated at that time, at least by Burden. If Canfield did not enforce the usury law Burden had nothing to fear. If the agreement did not bind Canfield, it did not bind anyone and yet Burden, if this testimony be true, made it absolutely useless to accomplish the object for which he says it was signed.

"Why should Burden make an agreement to enable him to receive usurious interest and at the same time make it

impossible for him to take such interest without placing him absolutely at the mercy of Canfield?

"There is no pretense that Burden was *non compos mentis* at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, 'void for usury.'

"We must assume that Burden is a man of ordinary common-sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary and immediately send the 'combination' to the burglar whom he had most reason to dread."

Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. *Stillman v. Northrup*, 109 N. Y. 473, 478; *White v. Benjamin*, 138 N. Y. 623, 624. In the case last cited, it was said:

"Usury is a crime and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence."

This the appellant has not done.

Decree affirmed.

MR. JUSTICE PITNEY dissents.